SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 234

THE UNITED STATES OF AMERICA, EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY, ET AL., PETITIONERS,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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[fol. 2]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

Law. No. 82771

THE UNITED STATES OF AMERICA ex Rel. CHICAGO GREAT WESTERN RAILROAD COMPANY and The Kansas City Southern Railway Company, Relators,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent

PETITION—Filed May 31, 1933

To the Supreme Court of the District of Columbia:

Now comes the relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company and respectfully show to the court:

(1) The relator, Chicago Great Western Railroad Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Illinois and having its principal office and place of business in Chicago, in the State of Illinois. The relator, The Kansas City Southern Railway Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Missouri, having its principal office and place of business at Kansas City, in the State of Missouri.

(2) Both of the relators are common carriers, engaged in the transportation of persons and property in interstate commerce between points in various states of the United States and, as such, are subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce" and Acts amendatory thereof and supplemental thereto, including the Transportation Act, 1920, and various other Acts of Congress designed to regulate interstate commerce. Each of said relators owns and operates a line of railroad to the City of Kansas City,

Missouri. The lines of railroad of relators connect at Kansas City, Missouri, with the railroad of the Kansas City Terminal Railway Company (hereinafter called the Terminal Company.)

[fol. 3] (3) The respondent, Interstate Commerce Commission (hereinafter called the Commission), is a commission created by the Act to Regulate Commerce and charged with certain duties thereunder and under other Acts enacted by Congress and relating to such interstate commerce.

(4) The Terminal Company is a railroad corporation organized and existing under and by virtue of the laws of the State of Missouri, having its principal office and place of business at Kansas City, in the State of Missouri. It was incorporated in 1906 for the purpose of acquiring, constructing, owning and operating, for the benefit of the railroad companies owning its stock, a union station and other terminal facilities in Kansas City, Missouri, and Kansas City, Kansas. Such facilities were acquired and constructed and the Terminal Company has been for many years and is now operating them in interstate commerce and is a common carrier subject to the provisions of the Act to Regulate Commerce and acts amendatory thereof and supplemental thereto.

(5) On June 12, 1909, a Stock Trust Agreement was entered into between The Atchison, Topeka and Santa Fe Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis and San Francisco Railroad Company, Union Pacific Railroad Company, The Chicago and Alton Railroad Company, The Wabash Railroad Company, Missouri, Kansas and Texas Railway Company, The Missouri Pacific Railway Company, and Chicago, Burlington and Quincy Railroad Company, as parties of the first part (hereinafter termed the Proprietary Companies), which companies at that time owned, in equal parts, all the capital stock of the Terminal Company; Pioneer Trust Company of Kansas City, Missouri, as Trustee, party of the second part, and the Terminal Company, as party of the third part. Under said agreement, each of the Proprietary Companies agreed to execute an agreement with respect to the use by it of the facilities of the Terminal Company

and payment by it of a share of the expenses of operating and maintaining such facilities, and as security for the performance by it of such obligations, agreed to transfer to the Trustee all but five shares of the capital stock of the [fol. 4] Terminal Company then owned by it. Such shares were to be voted by the Proprietary Companies owning them, if such Companies were not in default under the agreement covering the use of the Terminal Company's facilities, under proxies to be furnished by the Trustee, but if any Proprietary Company was excluded from the use of such facilities, then its stock was to be held by the Trustee for the benefit of the Proprietary Companies continuing to enjoy such use.

(6) On June 12, 1909, an Operating Agreement was entered into between the Terminal Company, as party of the first part, the Proprietary Companies, as parties of the second part, and Illinois Trust and Savings Bank, as Trustee, as party of the third part, in and by which agreement provision was made for the construction of a union passenger station at Kansas City, Missouri, and for the use of such station and the other terminal facilities of said Terminal Company by the said Proprietary Companies. Said agreement was the agreement referred to in the Stock Trust Agreement hereinbefore mentioned. On January 24, 1910, an agreement supplemental to the Operating Agreement of June 12, 1909, was entered into between the Terminal Company, as party of the first part, relators, The Kansas City Southern Railway Company and Chicago Great Western Railroad Company, as parties of the second part, the Proprietary Companies, as parties of the third part, and Illinois Trust and Savings Bank, as Trustee, as party of the fourth part, in and by which said agreement of January 24, 1910, all the provisions of said Operating Agreement of June 12, 1909, were extended to and made effective as to said relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company. Under said agreement of January 24, 1910, relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company acquired a sufficient number of shares of the capital stock of the Terminal Company, so that each of them and each of the Proprietary Companies owned one-twelfth of such capital stock. Said capital stock so acquired by said relators was

then deposited with the Trustee under the Stock Trust Agreement of June 12, 1909, and said relators were put in the same relation to the Terminal Company as the Proprietary Companies. The Operating Agreement of June 12, [fol. 5] 1909, and the Supplemental Agreement of January 24, 1910, constitute one agreement in fact and effect and will be hereinafter collectively termed the Operating Agreement, copies thereof being attached hereto and made a part hereof, marked "Exhibit 1."

(7) Shortly after the making of the Operating Agreement of June 12, 1909, the Terminal Company made arrangements for and subsequently issued and sold $50,000,000 of 4% bonds, secured by mortgage on the properties of the Terminal Company. The Terminal Company also proceeded to construct the union station and certain other terminal facilities referred to in the Operating Agreement, and since the date hereof, the Proprietary Companies and their successors in interest, including relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, have used said station and other terminal facilities in accordance with the terms of said Operating Agreement.

(8) Under Section 1 of Article II of the Operating Agreement, the Proprietary Companies, including relators, were required to pay, as the same became due, one-twelfth of all interest due upon the first mortgage bonds of the Terminal Company amounting to $50,000,000, one-twelfth of the principal of said bonds as and when the same became due and payable, and one-twelfth of the taxes, rents, benefits, assessments or other governmental charges of any kind made against the Terminal Company or its properties. Said Proprietary Companies, including relators, were also required to assume, in equal parts, any of the aforementioned amounts due from any one of them which might be in default or fail to make the payments required of it under said Operating Agreement. The foregoing payments were required to be made without respect to the amount of use made of the Terminal Company's facilities by the Proprietary Companies, including relators. Under other paragraphs of Article II of the Operating Agreement all other expenses of the Terminal Company, including all maintenance and operation expenses, were to be distributed

among the Proprietary Companies, including relators, on the basis of the percentage of use made by each of said companies of the facilities of the Terminal Company. Ever since the execution of the Operating Agreement, relators and the Proprietary Companies or their successors have [fol. 6] made payments under the Operating Agreement in accordance therewith. Each of the users of the Terminal Company's facilities makes such use thereof as is necessary to afford suitable service to the public, and the percentage of such use by each user is thus different. Four of such users have always made and now make a much larger use of such facilities than the other eight users, including relators, notwithstanding which all such users are required by the Operating Agreement to pay the same percentage of the interest and tax charges of the Terminal Company. As illustrating the gross discrimination resulting from the difference between the charges which the smaller users of the Terminal Company's facilities must pay and the charges which the larger users must pay, the largest user in 1932, whose use was 26.06% of all the use of said facilities, paid $195,303.56 (on a numerical basis) as its share of the interest and taxes paid by the Terminal Company; while the smallest user (one of relators), whose use was only 2.24% of all the use, paid $190,812.99. If said charges for interest and taxes had been paid by the using railroad companies on a user basis, said large user would have paid $599,655.32 instead of $195,303.56, and said small user would have paid $51,543.67, instead of $190,812.99. There is attached hereto and made a part hereof, marked "Exhibit 2," a statement showing the amount paid in 1932 by each user of the Terminal Company's facilities on account of the interest and tax charges of said Company, as compared with the amount which each such user would have paid had such charges been distributed among such users on a user basis. Said statement shows that in 1932, the four large users of said facilities, because of the distribution of charges required by the Operating Agreement, saved $811,986.08 in operating expenses resulting from their use of said facilities, which saving was exacted from the smaller users of said facilities, whose operating expenses were increased by the same amount.

(9) Sometime prior to March 10, 1924, Missouri-Kansas-Texas Railroad Company, the purchaser at judicial sale of all the railways and properties of Missouri, Kansas and

Texas Railway Company, one of the Proprietary Companies, in exercise of a right conferred upon it by decree entered in receivership proceedings involving Missouri, [fol. 7] Kansas and Texas Railway Company and its properties, elected not to assume the Operating Agreement theretofore entered into by said Missouri, Kansas and Texas Railway Company, and renounced and disaffirmed said agreement. Thereafter, on March 10, 1924, said Missouri-Kansas-Texas Railroad Company filed with the Commission a petition asking for the entry of an order by said Commission, pursuant to the provisions of Paragraph (4) of Section 3 of the Act to Regulate Commerce, according to it the right to use, upon equitable terms, designated portions of the passenger station and other terminal facilities of the Terminal Company at Kansas City, Missouri-Kansas. In said petition it was alleged that the terms imposed upon said Missouri-Kansas-Texas Railroad Company by the Operating Agreement, for its use of said station and terminal facilities, were unjust, inequitable and burdensome, in that each of the parties thereto was required to pay one-twelfth of the interest on the bonded indebtedness of the Terminal Company and one-twelfth of the taxes, general and special, payable by it in each year, without regard to the measure of use of said terminal facilities made by each of the railroad companies, parties to said agreement. It was prayed in said petition that said Commission should prescribe, upon a user basis, the terms upon which said Missouri-Kansas-Texas Railroad Company should be permitted thereafter to use those portions of said terminal facilities which it desired to us. Said petition was received and filed by the Commission as its Docket Number 15682. Pending hearing upon said petition, the Commission entered its Service Order No. 40, permitting said Missouri-Kansas-Texas Railroad Company to use the terminal facilities of the Terminal Company under the terms and provisions of the Operating Agreement and for the compensation therein provided, subject to the final decision of the Commission in said cause; and in the event of the failure of the parties to agree upon proper compensation, upon such terms as the Commissioner might thereafter fix.

(10) Thereafter, and before any hearings were had by the Commission in its said Docket 15682, the relators herein filed with the Commission intervening petitions in

said cause, in which petitions it was generally alleged that said interveners were entitled to the same relief prayed by said Missouri-Kansas-Texas Railroad Company in the [fol. 8] petition theretofore filed by it; that the distribution of the taxes and interest charges of the Terminal Company among the proprietary lines thereof was inequitable, unjust, unreasonable, discriminatory, and unlawful; that the granting of the relief requested by said Missouri-Kansas-Texas Railroad Company would aggravate such injustice, inequity and discrimination; and that the Operating Agreement was unjust, inequitable and burdensome. It was then prayed that the Commission enter an order which would place the use of the terminal facilities of the Terminal Company and the compensation to be paid for such use by each of the railroad companies, parties to the Operating Agreement, upon a fair, just and equitable basis, in proportion to the use thereof made by the various parties. Copies of said intervening petitions are attached hereto, and made a part hereof, marked Exhibits 3 and 4. Petitions of intervention were also filed in said cause by the other railroad companies using the facilities of the Terminal Company, the petitions of the smaller users praying generally for the same relief requested by relators, and those of the larger users praying generally that the relief requested by Missouri-Kansas-Texas Railroad Company be denied. Upon the filing of said petitions of intervention, orders were entered by the Commission permitting said interventions, and, except as hereinafter stated, the parties filing said petitions were thereafter treated and considered as parties to said cause.

(11) Thereafter, full hearings were held by the Commission in its Docket 15682 upon the issues presented by the petition of said Missouri-Kansas-Texas Railroad Company, the said petitions of intervention and various other motions and petitions filed by the parties to said cause, and on November 10, 1925, the Commission issued its report in said cause, said report being published in Volume 104 of the Interstate Commerce Commission Reports at page 203. A copy of said report, together with the dissents of various Commissioners, is attached hereto as Exhibit 5. In said report, the Commission disregarded the fact that the entire amount paid by each railroad company using the facilities of the Terminal Company constituted the

charge made by the Terminal Company against such using company for its use of such facilities; the fact that such charges were discriminatory in favor of the railroad com- [fol. 9] panies making the largest use of such facilities and against those making small use thereof; the fact that the payments made by the smaller users of the facilities of the Terminal Company constituted an undue burden upon and discrimination against the interstate commerce of each of them, and assumed that the Operating Agreement was an ordinary business contract entered into, in part, at least, for the profit to be derived therefrom, although there was no possibility of such profit. A majority of the Commission therefore held that since all payments to be made by railroad companies because of their use of the facilities of the Terminal Company were fixed by the Operating Agreement, it had no jurisdiction to enter an order prescribing any different basis for the making of such payments, and that the intervening petitions of the small users of such facilities, including relators, should be dismissed.

In stating the question passed upon by it, the Commission said at page 222 of its report:

"Whether, then, Congress has or has not appropriately exerted its plenary power directly or through us is a question at the threshold of each case, and it remains here to consider whether the particular power invoked by the interveners has been conferred upon us."

Dealing with its powers under Paragraph (4) of Section 3 of the Act to Regulate Commerce, the Commission said at page 223 of its report:

"The power and authority thus invoked are not conferred by the quoted paragraph."

In discussing its power under Section 15 (a) of the Act to Regulate Commerce, the Commission said at page 224 of its report:

"However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. * * * Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to

find the requisite power or authority in any other provision of the act."

[fol. 10] The distribution of charges under the Operating Agreement was so unjust that the Commission, while denying its jurisdiction to correct the situation, said at page 225 of its report:

"In reaching the foregoing conclusions we nevertheless think that this case strongly suggests the advisability of a reexamination by the respective participating carriers of terminal arrangements which have been developed through past decades, including division of capital charges and adjustment of property interests. The subject is obviously of such importance to the public, including the railroads, that a reappraisal should be voluntarily undertaken in the light of present conditions.

(12) Pursuant to the conclusions thus expressed in its report, the Commission made an order in said Docket 15682, on November 10, 1925, dismissing the intervening petitions theretofore filed by The Chicago and Alton Railroad Company and the Receivers thereof, Chicago, Milwaukee and St. Paul Railway Company, The Wabash Railway Company, St. Louis-San Francisco Railway Company, and relators, The Kansas City Southern Railway Company and Chicago Great Western Railroad Company. Since the entry of said order, relators have not been parties to said cause and have had no right to be heard therein, nor on review of any order made therein, although they have had at all times and now have a vital and direct interest in any disposition made thereof by the Commission.

(13) Subsequent to the report of the Commission in said Docket 15682, on November 10, 1925, the right of Missouri-Kansas-Texas Railroad Company to elect not to assume the Operating Agreement was upheld in the courts, and in March, 1931, said Railroad Company filed with the Commission its application for further hearings in said cause to determine the amount of compensation which should be paid by it for its use of the facilities of the Terminal Company, said application being the first action taken in said cause after the making of the order of November 10, 1925. In April and May, 1931, before any such further hearings were had, relators filed with the Commission petitions asking for a rehearing of the Commission's order of November

10, 1925, dismissing their intervening petitions in said cause. Said petitions for rehearing were denied by the [fol. 11] Commission by order entered on June 1, 1931. Since that date, the issues presented by the petition of said Missouri-Kansas-Texas Railroad Company in said Docket 15682, have been the subject of numerous hearings by the Commission, said cause now being set for further hearing upon June 1, 1933. Relators have been and will be unable to take any part in said hearings in order to protect their interests, the Commission's order of November 10, 1925, having terminated and barred their right to be heard. During the pendency of said Docket 15682, said Missouri-Kansas-Texas Railroad Company has been and is now using the passenger station and other terminal facilities of the Terminal Company by virtue of various agreements between it and the Terminal Company and under orders of the Commission, and for its use of said terminal facilities is paying compensation upon the basis prescribed by the Operating Agreement, subject, however, to retroactive revision to the basis of compensation hereafter prescribed by the Commission in said Docket 15682. Since November 10, 1925, there has been no change in Docket 15682, nor in the conditions and circumstances which caused the filing by Missouri-Kansas-Texas Railroad Company of its petition therein. Said cause is still pending before the Commission and there has been no final order entered therein. The Union Station and other facilities of the Terminal Company are still being used by relators and the other Proprietary Companies, and/or their successors in interest, in the same way they were used prior and subsequent to November 10, 1925, by said Companies and/or their successors in interest. The payments now being made by said Companies and/or their successors in interest are made under the same conditions and circumstances as those which obtained on November 10, 1925 and prior thereto.

(14) Relators charge that it may be reasonably anticipated that the Commission, in fixing in said Docket 15682 the compensation to be paid by said Missouri-Kansas-Texas Railroad Company for its use of the terminal facilities of the Terminal Company, will permit that use of such facilities upon the payment of a lesser compensation than said Missouri-Kansas-Texas Railroad Company would be required to pay under the terms and provisions of the

Operating Agreement, and that in the event of such disposition of said Docket 15682, the amounts now payable by each [fol. 12] relator under the Operating Agreement for its use of the facilities of the Terminal Company will be increased by its proportion of the difference between the amounts Missouri-Kansas-Texas Railroad Company would have been required to pay under the Operating Agreement and the amounts it may be required to pay under the order of the Commission, because if the amount to be paid by said Missouri-Kansas-Texas Railroad Company under the order of the Commission is less than its present proportion of the operating expenses, taxes and interest of the Terminal Company, the amount of such reduction will be distributed in equal parts among the other users of such facilities, including relators, and thereby added to the charges which they are now paying; that such a decision in said Docket 15682 will aggravate and increase the present injustice and inequity of the Operating Agreement, the present discrimination against relators resulting from its enforcement, and the undue burden imposed by its operation upon the interstate commerce of each of the relators; that relators have a lawful right to be heard in said Docket 15682, on the issue of the compensation to be paid by them for their use of the facilities of the Terminal Company, and the issue of the compensatioin to be paid by said Missouri-Kansas-Texas Railroad Company for its use of said facilities, but have been deprived and are now deprived of said right under the order of the Commission entered in said cause on November 10, 1925.

(15) That there is no hope for any lightening of the burdens now resting upon the small users of the facilities of the Terminal Company is demonstrated by the fact that the properties of St. Louis-San Francisco Railway Company and The Wabash Railway Company, both small users of said facilities, are now being operated by receivers appointed by United States District Courts. The receivers of The Wabash Railway Company have already renounced the Operating Agreement and declined to be further bound by it, and are using said facilities under a Service Order issued by the Commission. The receivers of St. Louis-San Francisco Railway Company have a similar right to disaffirm and renounce the Operating Agreement. Also, The Alton Railroad Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, which are small users

of said facilities and the respective purchasers at judicial [fol. 13] sale of the railways and property of The Chicago and Alton Railroad Company and Chicago, Milwaukee and St. Paul Railway Company, have the right, under decrees entered by United States District Courts, to disaffirm and renounce the Operating Agreement. If each of the aforesaid four users of said facilities should renounce the Operating Agreement and refuse to be further bound thereby, and be granted the right by the Commission to use said facilities for lesser amounts than they are now paying, the difference between said amounts and the amounts said users are now paying will have to be paid in equal shares, by the other users of said facilities, including relators, thus imposing upon relators an additional obligation so great as to constitute an excessive and undue burden upon the interstate commerce of each of them.

(16) Relators further charge that the action of the Commission in denying its jurisdiction and dismissing the intervening petitions of the so-called small users of the facilities of the Terminal Company, including relators, as was done in its order of November 10, 1925, was erroneous in law and constituted a denial by the Commission of a jurisdiction conferred upon it by the Act to Regulate Commerce and acts amendatory thereof and supplemental thereto.

(17) Relator further charges that under the law, the Commission did have jurisdiction to consider, pass upon and decide the merits of the issues presented to it in the intervening petitions, including those of relators, which were dismissed by its order of November 10, 1925, entered in said Docket 15682, and that by failing and refusing to exercise its said jurisdiction, the Commission acted in an arbitrary manner and contrary to law and deprived relators of rights to which they were and are entitled under the law.

(18) Relators further charge that the Commission did not give consideration to the merits of the issues presented to it for determination in the intervening petitions which were dismissed by it in its said order of November 10, 1925, but reached a conclusion erroneously denying its jurisdiction to consider and decide such issues on their merits; that such denial of jurisdiction was contrary to law and constituted a denial of the lawful rights of rela-

tors; that except for such relief as should be granted by the Commission but which said Commission has refused to grant, relators have no adequate judicial remedy other [fol. 14] than by petition to this Court for the issuance of its writ of mandamus. This is the first application for a writ of mandamus in this cause.

Wherefore, relators respectfully pray to this Honorable Court:

(1) That a rule be laid requiring the respondent, Interstate Commerce Commission, to appear and answer this petition within such time as the Court may deem proper, and to show cause by a time limited in said rule why a writ of mandamus should not issue.

(2) That the Court grant an order for the issuance of a peremptory writ of mandamus commanding and directing the respondent, Interstate Commerce Commission, to set aside, vacate and annul its order of November 10, 1925, made in said Docket 15682, dismissing the intervening petitions of relators, and its order of June 1, 1931, denying their petitions for a rehearing in said cause, and commanding and directing said respondent to forthwith consider and pass upon the merits of the issues raised by said intervening petitions and decide the same upon the merits thereof; or if the Court be not minded to issue its peremptory writ, then that an alternative writ be issued commanding the respondent, Interstate Commerce Commission, to appear before the Court on a day to be named in said writ and show cause, if any there be, why a peremptory writ of mandamus should not issue requiring said respondent to perform said acts, and for such other further order and relief as they may be entitled to in the premises.

And as in duty bound your relators will ever pray.

Chicago Great Western Railroad Company, The Kansas City Southern Railway Company, by P. H. Joyce.

[fol. 15] *Duly sworn to before P. H. Joyce. Jurat omitted in printing.*

Ralph M. Shaw, F. H. Moore, A. F. Smith, F. H. Towner, Attorneys for Relators. F. H. Towner, 38 So. Dearborn St., Chicago, Ill.; Union Trust Bldg., Washington, D. C., c/o Hamilton & Hamilton.

[fol. 16] EXHIBIT 1 TO PETITION

Operating Agreement Between Kansas City Terminal Railway Company and Ten Railway Companies, Dated June 12, 1909, and First Supplemental Agreement Between Kansas City Terminal Railway Company and Chicago Great Western Railroad Company, and The Kansas City Southern Railway Company, Dated January 24, 1910

[fol. 17] Agreement Between Kansas City Terminal Railway Company, of the First Part; The Atchison, Topeka and Santa Fe Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis and San Francisco Railroad Company, Union Pacific Railroad Company, The Chicago and Alton Railroad Company, The Wabash Railroad Company, Missouri, Kansas and Texas Railway Company, The Missouri Pacfic Railway Company, and Chicago, Burlington and Quincy Railroad Company, of the Second Part, and Illinois Trust and Savings Bank, as Trustee, of the Third Part.

Relating to Union Passenger Station and Other Terminal Facilities at Kansas City

Dated June 12th, 1909.

[fol. 18] Indenture, made this 12th day of June, 1909, by and beween Kansas City Terminal Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri (hereinafter called the Terminal Company), party of the first part, The Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas (hereinafter called the Atchison Company); Chicago, Milwaukee and St. Paul Railway Company, a corporation of the State of Wisconsin (hereinafter called the St. Paul Company); The Chicago, Rock Island and Pacific Railway Company, a corporation of the States of Illinois and Iowa (hereinafter called the Rock Island Company); St. Louis and San Francisco Railroad Company, a corporation of the State of Missouri; Union Pacific Railroad Company, a corporation of the State of Utah; The Chicago and Alton Railroad Company, a corporation

of the State of Illinois; The Wabash Railroad Company, a consolidated corporation organized under the laws of the State of Missouri and other states; Missouri, Kansas and Texas Railway Company, a corporation of the State of Kansas; The Missouri Pacific Railway Company, a consolidated corporation organized under the laws of the States of Missouri, Kansas and Nebraska, and Chicago, Burlington and Quincy Railroad Company, a corporation of the State of Illinois, parties of the second part; and Illinois Trust and Savings Bank (hereinafter called the Trustee Company), a corporation of the State of Illinois, the corporate trustee under the First Mortgage, hereinafter mentioned, of the Terminal Company, party of the third part:

Whereas, the Terminal Company owns a line of railroad and other railroad facilities located in and about the city of Kansas City, Missouri, and the city of Kansas City, [fol. 19] Kansas, which by deeds of conveyance it has acquired from The Kansas City Belt Railway Company, and from the Union Depot Company, and, by other conveyances, has acquired, or is about to acquire, the necessary land therefor and to construct a Union Passenger Station and certain additional railroad facilities and appurtenances, all of which, both those now owned and those to be acquired or constructed, are shown in detail upon maps, schedules, plans and specifications on file among the records of the Terminal Company, which said maps, schedules, plans and specifications have been marked for identification by the Chief Engineer of each of the railway companies parties hereto and accepted and approved by an executive officer of each of at least seven of the railway companies parties hereto and which are hereinafter collectively referred to as the "Plans" and are made a part of this agreement as fully as if set forth at length herein or attached heerto; and,

Whereas, the Terminal Company is about to execute to said Trustee Company and to Samuel W. Moore, of Kansas City, Missouri, as trustees, a mortgage or deed of trust, dated Jan. 3d, 1910, to be known as its First Mortgage, covering all the property of the Terminal Company now owned and hereafter to be acquired by the use of the bonds secured thereby or their proceeds, including this agreement and the rentals to be paid heerunder, as herein provided, to secure an issue of bonds of the Terminal Company not to

exceed in the aggregate fifty million dollars at any one time outstanding; and

Whereas, each of the railway companies parties of the second part hereto (hereafter collectively referred to as the Railway Companies) desires, for purposes of greater economy and convenience, to avail itself of the services of [fol. 20] the Terminal Company and the use of said Union Passenger Station, line of railroad, tracks, and all other facilities of the Terminal Company; and the Terminal Company is willing to serve the Railway Companies and to grant to the Railway Companies the right to use all the facilities of the Terminal Company upon the terms and conditions hereinafter set forth:

Now, therefore, the parties hereto do mutually covenant and agree with each other as follows:

Article I

Terminal Company agrees.

The Terminal Company, in consideration of the sums to be paid by the Railway Companies respectively as hereinafter provided, hereby covenants and agrees with the Railway Companies and with each of them as follows:

To build station and other facilities.

Section 1. That it will proceed with all reasonable dispatch to acquire the necessary land and complete the construction of said Union Passenger Station and the facilities appurtenant thereto at the location thereof shown on said Plans, and to rearrange, reconstruct, add to and better the railroad and terminal facilities at present owned or controlled by it and make all necessary and desirable connections with the railroads of each of the Railway Companies, all in accordance with such Plans.

"Terminal facilities" defined.

The said Union Passenger Station and the said tracks and other facilities of the Terminal Company, and all additions, betterments, extensions and improvements thereto, and all the facilities appurtenant thereto that are now owned or may be hereafter acquired by the Terminal Company are hereinafter referred to as the "Terminal Facilities."

Grant of right to use same.

[fol. 21] Sec. 2. That it will, and it does hereby, subject to the terms and conditions in this agreement contained, give and grant to each of the Railway Companies for and during the term beginning at the date when the Terminal Facilities shall be ready for use as in Section 10 of Article

III hereof provided and continuing thereafter for and during the full term of two hundred years thence next ensuing, the right and privilege of running and operating its passenger trains, into said Union Passenger Station and of using and enjoying, for the purpose of its passenger, express and mail business, the said Union Passenger Station and its appurtenances so to be constructed by the Terminal Company hereunder, and all conditions, betterments, extensions and improvements thereto that hereafter during said term shall be acquired by the Terminal Company; and also the right of running and operating its passenger trains, for the purposes of the passenger traffic of such Railway Company over and upon the railroad and railroad tracks of the Terminal Company as in this contract provided, and of using and enjoying said railroad and tracks for the purposes of the passenger traffic of such Railway Company, and over all additions and betterments, extensions and improvements thereto that hereafter during said term shall be acquired by the Terminal Company, such use by each of the Railway Companies to be in common with all other Railway Companies to which similar rights are hereby or to which similar rights hereafter may be granted by the Terminal Company in pursuance of the terms, conditions and limitations in this agreement expressed. The rights and privileges by this Section 2 granted shall include the right to occupy sufficient space in the Union Passenger Station and its appurtenances for the sleeping car and express business of each of the Railway Companies, upon the payment therefor of such reasonable [fol. 22] compensation as may be fixed, from time to time, by the Terminal Company; but shall not include the right to make up or break any passenger train or to do any switching of passenger cars or trains upon said Terminal Facilities without written permission of the Terminal Company, and then only under such reasonable terms and regulations as the Terminal Company may from time to time prescribe.

For passenger traffic.

Certain rights excluded.

Sec. 3. That it will upon request furnish motive power, switch, move and handle the passenger cars of the Railway Companies, respectively, as herein provided, upon or over the Terminal Facilities, or any part thereof, without preference or discrimination, and that it will keep and

To furnish switching service for passenger traffic and

provide round house, etc.

To make light repairs, etc.

maintain a roundhouse, storage tracks, cleaning tracks and other similar facilities where it will care for and make light repairs on the passenger engines and passenger cars of the Railway Companies, for which services charges shall be made by the Terminal Company at such rates as may be established by it from time to time.

Grant of right to use for freight traffic.

Sec. 4. That it will give and grant, and it does hereby give and grant, to each of the Railway Companies, subject to such reasonable regulations as the Terminal Company may from time to time prescribe, and so far only as said right may be exercised without materially interfering with the passenger traffic in this contract provided for, the right and privilege, for said term of two hundred years, of running its freight trains, drawn by its own motive power and manned by its own crews, upon and over said Terminal Facilities, or any part thereof. The right and

Exceptions.

privilege by this Section 4 granted shall not include the right to make up or break any freight train or to do any switching of freight cars or trains upon said Terminal Facilities without written permission of the Terminal Company, and then only under such reasonable terms and [fol. 23] regulations as the Terminal Company may from time to time prescribe.

Switching service for freight traffic.

Sec. 5. That it will, for all internal movements thereof, furnish motive power, switch, move and handle the freight cars of the Railway Companies, respectively, as herein proided, upon or over the Terminal Facilities, or any part

Will maintain Terminal Facilities.

thereof, without preference or discrimination, for which service charges shall be made by the Terminal Company at such rates as may be established by it from time to time.

Sec. 6. That it will keep and maintain said Terminal Facilities at all times during said term, in good order, condition and repair and will protect the same by such insurance against loss or damage by fire as may in the judgment of the Terminal Company be adequate, the cost of such insurance being considered a part of the expense of

Will Maintain franchises and corporate existence.

maintaining and operating said Terminal Facilities as hereinafter provided.

Sec. 7. That it will not do or omit to do any act, the doing or omission of which will operate directly or indirectly to forfeit any of the rights, privileges and franchises acquired under its charter or howsoever acquired,

or which will, in any manner, impair the value of any of the privileges, rights or property, the right to use which is hereby granted to the Railway Companies, or to impair its power or ability to perform all its obligations in this contract provided for; and that it will, at the expiration of the present term of its corporate existence, cause the same to be renewed and extended in manner and form as may then be provided by law, and will cause similar renewals and extensions to be made from time to time as the same shall be necessary to maintain, during the full term of this agreement, the existence and power with which it is now vested.

[fol. 24] That it will at all times and from time to time during the said term, when requested by said Railway Companies, or any of them, put forth and exercise each and every corporate power and do each and every corporate act which said Terminal Company might now or may at any time hereafter lawfully put in force or exercise to enable the Railway Companies and each of them to enjoy and avail themselves of and exercise every right, franchise and privilege hereby granted in the proper management and operation of the Terminal Facilities according to the terms of this agreement.

Will exercise corporate powers.

Sec. 8. That it will repay to each of the Railway Companies all sums which shall be paid or advanced to the Terminal Company by such Company prior to the date when said Terminal Facilities shall be ready for use, as in Section 10 of Article III hereof provided; provided, however, that until said date, the Atchison Company, the St. Paul Company and the Rock Island Company, anything to the contrary herein contained notwithstanding, shall continue to make payments to The Kansas City Belt Railway Company, or its successors or assigns under the respective agreements in Article IV particularly referred to in respect of interest, taxes and maintenance upon such portions of the Terminal Facilities as they shall respectively continue to use under said agreements respectively; it being, however, expressly understood and agreed that during the period of rearrangement of the present facilities and construction of new facilities, as hereinbefore provided, the payments to be made by the Atchison Company, the St. Paul Company and the Rock Island Company, under said respective agreements, shall in no wise be increased by rea-

Will refund certain payments.

son of the rearrangement of facilities and the construction of new facilities, as hereinbefore provided.

[fol. 25] Article II

Railway companies to pay:

Section 1. Each of the Railway Companies hereby covenants and agrees with the Terminal Company, with the Trustee Company and with each of the other Railway Companies, to pay, from time to time as hereinafter provided, the following sums, viz:

Interest on mortgage.

(a) Ten days prior to each date when any interest shall be payable upon any bonds that shall have been issued and that shall be outstanding under said First Mortgage of the Terminal Company, a sum equal to one-tenth of the interest to become due and payable on such date on all bonds then outstanding under said First Mortgage.

Principal of mortgage.

(b) On the day when any of said First Mortgage Bonds of the Terminal Company shall become due and payable either by their terms, or by acceleration of payment as provided in the said bonds or in said mortgage, a sum equal to one-tenth of the principal of such First Mortgage Bonds payable on such date.

Taxes.

(c) Ten days prior to each date when any sum shall be payable by the Terminal Company for taxes, rates, benefits, assessments or other governmental charges of any kind, a sum equal to one-tenth of such sum to become payable on such date.

Interest on Belt Line mortgage.

(d) Ten days prior to each date when any interest shall be payable upon any bonds that shall have been issued and that shall be outstanding under the certain first mortgage, dated July 1, 1886, executed by The Kansas City Belt Railway Company to The New England Trust Company, as Trustee, a sum equal to one-tenth of the interest to become due and payable on such date on all bonds then outstanding under said last mentioned mortgage. On the day when any of said first mortgage bonds of The Kansas City Belt Railway Company shall become due and payable, a sum equal to one-tenth of the principal of such first mortgage bonds payable on such date, unless said bonds shall be retired with the First Mortgage Bonds or their proceeds, as provided in said First Mortgage.

Principal of Belt Line mortgage.

[fol. 26] (e) Ten days prior to each date when any interest shall be payable upon any other bonds or obligations that shall be issued as in Section 3 of this Article II provided, by the Terminal Company with the written consent of a majority of the Railway Companies then not in default in the payment of the several sums by them payable under this Article, a sum equal to one-tenth of the interest to become due and payable on such date on such other bonds or obligations. Interest on other bonds.

(f) In case any of the Railway Companies shall make default in the payment of any sum which under the provisions of this section shall be payable by such Railway Company, then the sum which such Railway Company in default failed to pay shall be apportioned equally among the other Railway Companies or the one of them not in default, and each of such other Railway Companies, or the one (as the case may be), shall pay a ratable (or the whole) share of such sum forthwith upon demand of the Terminal Company, or, if the Terminal Company be in default, as hereinafter specified, under its said First Mortgage, then upon demand of the Trustee Company. Default of any Ry. Co.

The obligation of each Railway Company to make the payments specified in this section is absolute and unconditional; provided, that if any other Railway Company or Companies shall be hereafter from time to time admitted to the use of the Union Passenger Station and Terminal Facilities under agreements to pay the principal and interest of the First Mortgage Bonds and taxes upon substantially the same terms assumed by the Railway Companies in this agreement, then the payments to be made by the Railway Companies respectively under this Section 1 shall be reduced or adjusted, from time to time, to such a basis in respect to payment of principal, interest and taxes as will require each Company to be directly responsible for such [fol. 27] a proportion of the interest, principal and taxes as it bears to the total number of Companies using said properties and assuming the payment of principal and interest. Such payments unconditional.

No termination or suspension of any rights of any Railway Company pursuant to any provision of this indenture, or otherwise, shall limit or affect the obligation of the Railway Company whose rights are terminated or suspended or the obligation of any other Railway Com-

pany to pay the said several sums during the full term beginning on the date hereof and continuing for two hundred years from and after the date when the Terminal Facilities shall be ready for use as in Section 10 of Article III hereof provided. Each of the Railway Companies agrees that it will make the several payments by it to be made as aforesaid absolutely and unconditionally, without deduction for any set-off or counterclaim or other excuse, during such full term.

To whom payments made.

Except as provided in Section 2 of this Article II the several sums payable by each of the Railway Companies under the foregoing provisions of this Section 1 shall be payable to the Terminal Company or pursuant to its written order, either at the office of the Terminal Company at Kansas City, Missouri, or at an agency or depository elsewhere to be designated by the Terminal Company by a written notice to each Railway Company, stating the sum to be paid by it and the date and place of payment, which notice shall be given by the Terminal Company to each Railway Company at least ten days prior to the date when such sum shall be payable. Each sum paid to the Terminal Company under any of the foregoing provisions of this section shall be set apart by it upon special trust, to apply the same to the payment of the interest, or principal [fol. 28] of bonds, or other obligations, or the taxes, rates, benefits, assessments or other governmental charges in respect of which such sum became payable hereunder, or to reimburse the Terminal Company to the extent it shall have paid any of said items out of its other funds.

How applied.

Receipts assigned to mortgage trustees.

Sec. 2. The sums payable by the Railway Companies under any paragraph of Section 1 of this Article, (except paragraph (e)) are hereby assigned to the Trustees under said First Mortgage of the Terminal Company, as additional security under said First Mortgage; provided, however, that if and so long as the Terminal Company shall not be in default in the payment of any interest or principal of any of said First Mortgage Bonds the several sums payable by the Railway Companies under Section 1 of this Article shall be payable to the Terminal Company and shall be received, collected and applied by it as provided in said Section 1 of this Article.

In case of default.

In case the Terminal Company shall be in default in the payment of any interest or principal of any of its

said First Mortgage Bonds, and the Trustee Company or its successor Trustee Company under said First Mortgage, shall have given notice of such default to the Railway Companies, the several sums payable by the Railway Companies under the foregoing provisions of this section during the continuance of such default shall be payable to the Trustee Company or its successor at its main office within ten days after written notice from such Trustee Company. Each sum paid to such Trustee Company or its successor as aforesaid shall be received by it upon special trust to apply the same to the payment of the interest, or principal of bonds, or other obligations, or the taxes, rates, benefits, assessments or other governmental charges in respect of which such sum became payable, until the same [fol. 29] shall be fully paid or discharged.

Payments made direct to mortgage trustee.

Sec. 3. Whenever the Railway Companies shall make any payments to the Terminal Company pursuant to paragraph (b) of Section 1 of this Article on account of the principal of said First Mortgage Bonds of the Terminal Company, then the Terminal Company shall issue and shall deliver to each of the Railway Companies making any such payment the mortgage bonds of the Terminal Company to an amount at par equal to such payment. Such bonds shall bear interest at such rate and be payable at such date and shall be of such form and tenor as shall have been approved in writing by a majority of the Railway Companies then not in default in the payment of any of the several sums payable by them under Section 1 of this Article; and upon the issue and delivery of any such bonds the Railway Companies shall be liable to contribute in respect to the interest on such bonds, as provided in paragraph (e) of said section. Provided, however, that if the Terminal Company shall then be in default under its said First Mortgage and if such payments by the Railway Companies shall be made to the Trustee Company under said First Mortgage, as provided in Section 2 of this Article, then the Railway Companies making such payments shall not be entitled to the receipt of new bonds, but the Railway Companies, subject to the prior payment in full of the principal and interest of all the remainder of the outstanding bonds of the Terminal Company under said First Mortgage, shall be subrogated to all rights, lien and security of the holders of the bonds

New bonds issued.

To Railway Co's paying old bonds.

Subrogation.

paid out of the moneys contributed by the Railway Companies and applied in payment of the principal of such bonds, as though such bonds had been assigned to the Railway Companies ratably in proportion to their respec- [fol. 30] tive payments; but subject, nevertheless, to the prior payment in full of the principal and interest of all such bonds that shall not have been paid by the Terminal Company or out of such moneys contributed by the Railway Companies respectively.

Notice not essential.

Sec. 4. No failure of the Terminal Company or of the Trustee Company or its successor to give any notice or to make a demand upon any Railway Company, as in this Article provided, shall affect the obligation of any of the other Railway Companies to make the payments specified in Section 1 of this Article; and in case of a failure to give to any Railway Company notice, as hereinbefore provided, to pay any sum, such notice may be given at any time thereafter, and thereupon such sum shall be payable on the tenth day after such notice shall have been given.

How notice to be given.

Any notice to or demand upon any Railway Company under this Article may be given by mailing the same addressed to such Railway Company at Kansas City, Missouri, unless such Railway Company shall have given previous notice in writing to the Terminal Company and to the Trustee Company designating some other address to which such notices and demands shall be mailed, in which case such notices and demands shall be mailed to the address so designated. Any notice or demand so mailed shall be deemed duly served upon the company to which the same was addressed five days after the date when the same was mailed, whether or not such notice was actually received, and no other notice shall be required.

Claims against defaulting Co.s.

Sec. 5. If any of the Railway Companies shall be required to make any payment under paragraph (f) of Section 1 of this Article on account of the default of any other Railway Company or Railway Companies, then the claim or claims of the Terminal Company against the Railway

enforced by Terminal Co.

[fol. 31] Company or Railway Companies in default shall be held and enforced by the Terminal Company, as Trustee for the Railway Companies that made such payment, and any sum or sums received or collected from such Railway Company or Railway Companies in default shall be applied ratably to reimburse, with interest at the rate of

seven per cent per annum, the Railway Companies which made such payment.

Ry. Co.s to pay

Sec. 6. Each of the parties of the first and second parts hereby covenants and agrees with each of the other parties hereto to pay into the Treasury of the Terminal Company, from time to time, the following sums, viz:

expenses of operation, maintenance, etc.

For each calendar month of said term, a share, to be fixed and determined as hereinafter provided, of all expenses incurred by the Terminal Company during such month in the operation, maintenance, renewal and repair of the Terminal Facilities (after applying to such renewal and repair any sums which may have been received on account of fire insurance), including all salaries, cost of labor, supplies, time tables, cost of fire, accident, fidelity and employers' liability insurance, insurance of employees engaged in the operation or maintenance of the Terminal Facilities; and including also all other expenses whatsoever during such month not otherwise herein expressly provided for.

Terminal Facilities divided into sections.

For the purpose of determining the share of all such expenses to be paid by each of the parties of the first and second parts under this Section 6, the Terminal Facilities shall be divided into sections, numbered consecutively from 1 upwards. The Terminal Company shall from time to time, upon the authorization of its Board of Directors, change the boundary and extent of said sections or any of them, as in its judgment may be deemed necessary or desirable.

Account of cars and mileage in each section.

[fol. 32] The Terminal Company shall keep an accurate separate account of all such expenses of each of said sections and of all cars and engines passing into and out of the Union Passenger Station section, and of the mileage within the other sections, and shall on or before the fifteenth day of each calendar month of said term, render to each of the parties of the first and second parts an accurate statement thereof for the preceding calendar month.

The Union Station section.

The share of all such expenses of the section embracing said Union Passenger Station and its appurtenances to be paid by each of such parties under this Section 6 for each calendar month of said term, shall be a sum bearing the same proportion to all such expenses for such month as the number of locomotives and cars operated by such party and arriving at or starting from the Union Passenger

Station, shall bear to the total number of locomotives and cars arriving at or starting from said Union Passenger Station during such month, it being understood and agreed that each locomotive shall be counted as two cars; that the locomotives and cars in through trains stopping at said Station in passage shall be counted on entering and again on leaving said Station; that the locomotives and cars arriving at said Station as a final destination shall be counted on entering said Station, and shall again be counted on starting from said Station on an out-bound trip; that locomotives and cars shall not be counted on leaving the Station for the purpose of going to yards, storage tracks, or engine houses, or on entering the Station from yards, storage tracks or engine houses for the purpose of starting from the Station on an out-bound trip; nor shall switch locomotives engaged in switching such cars be counted.

The other sections.

The share of all such expenses of each of said sections, other than the section embracing said Union Passenger [fol. 33] Station and its appurtenances, to be paid by each of such parties under this Section 6 for each calendar month of said term shall be a sum bearing the same proportion to all of such expenses for such month as the mileage of locomoties and cars operated by such party within such section shall bear to the total mileage of locomoties and cars so operated during such month (including cars and locomotives handled and operated by the Terminal Company), it being understood and agreed that each locomotive shall be counted as two cars.

The sums payable under this Section 6 shall be payable monthly within thirty days after bills have been rendered by the Terminal Company to the parties of the first and second parts, respectively, therefor.

Sums payable when.

The Terminal Company is authorized to make sight drafts against any of the Railway Companies for any sums remaining unpaid after the same become due and payable under this agreement.

Sight drafts.

Sec. 7. If the Terminal Company shall receive from any Railway Company or corporation or person any rental or other compensation for the use of the Terminal Facilities, or of any other property of the Terminal Company, or of any part thereof, including the gross revenue received by the Terminal Company on account of its switching operations, and excepting contributions or payments received from Railway Companies on account of the expense of op-

Disposition of revenue received by Terminal Company.

erating, maintaining, renewing and repairing the Terminal Facilities (which expenses are to be paid on car and mileage bases, as provided in Section 6 of Article II hereof), then the rental or other compensations, including the gross revenue from said switching operation, shall be disposed of and applied by the Terminal Company as follows:

(a) From the gross revenue derived from switching operations there shall be deducted the expense of con- [fol. 34] ducting and carrying on the switching operations from which said revenue is derived. The expense properly apportionable to said switching operations shall be determined by the Auditor, under the supervision of the Board of Directors, from time to time, but shall not include any proportion of interest, taxes or other fixed charges.

Expense of switching operations.

(b) From the revenue received by the Terminal Company from the rental of space or from concessions or privileges in respect to the Union Passenger Station building and appurtenances directly and immediately connected therewith, there shall be deducted a fair and equitable proportion of expense incidental thereto, such as insurance, light, heat, janitor service, superintendence, etc. Such apportionment shall be made by the Auditor, under the supervision of the Board of Directors, from time to time, but shall not include any proportion of interest, taxes or other fixed charges.

Expense incident to rental of space, concessions, etc.

(c) The monthly share of the expense of operating, maintaining, renewing and repairing the Terminal Facilities payable by the Terminal Company, in accordance with the provisions of Section 6 of Article II hereof, shall next be paid.

Terminal Company's share of operating expenses.

(d) The remainder of the revenues received by the Terminal Company, as provided in this section, after setting aside such sum as a working capital as the Board of Directors may from time to time determine, shall be credited monthly to such of the Railway Companies, parties hereto, as may be at the time contributing to the payment of the interest charge and taxes upon the Terminal Facilities, in accordance with Section 1 of Article II hereof, in the same proportion in which said contributions are then being made; and the amount so credited to each of said Railway Companies shall be deemed and taken to be an advance payment by it, pro tanto, of any sum payable by it under the [fol. 35] provisions of Section 1 of Article II hereof.

Remainder of revenue to be credited to Railway Companies.

Errors in accounts.

Sec. 8. The accounts for each fiscal year of the Terminal Company shall be revised and any errors or omissions found therein shall be corrected and supplied and all necessary readjustments made within ninety days after the close of such fiscal year, but any error, mistaken estimate or omission in any bill against any of the Railway Companies shall be adjusted by suitable charges or credits in the first subsequent bill after discovery of such error, mistaken estimate or omission and in any event within ninety days after the close of such fiscal year. If the amount of any charge to be made against any party hereto cannot be definitely ascertained and fixed, then the Board of Directors of the Terminal Company shall estimate the same as nearly as may be and each of the parties of the first and second parts agrees to be bound by such estimate and payment shall be made accordingly.

Payments and interest on default.

Sec. 9. All sums payable by any Railway Company under Section 1 of Article II hereof shall be payable in gold coin of the United States of America of the present standard of weight and fineness or its equivalent. All other sums payable hereunder by any party to any other party hereto shall be payable in lawful money of the United States of America.

Any Railway Company in default in the payment of any sum payable by it hereunder shall pay interest at the rate of seven per cent per annum upon the amount so in default.

Inspection of books and accounts.

Sec. 10. The books and accounts of the Terminal Company shall be open for inspection at all reasonable times by the President of each of the Railway Companies, or by such officer or agent as any of them may appoint to inspect the same. The Auditor of the Terminal Company [fol. 36] shall render to the Auditor of each of the Railway Companies monthly statements showing all business done by the terminal Company and all business done on the Terminal Facilities or any part thereof, during the previous month, and upon demand of any of the Railway Companies, shall furnish to its Auditor promptly such information as such Auditor may require respecting the business and operations of the Terminal Company.

Auditing Committee.

Sec. 11. At the beginning of each fiscal year the Board of Directors shall select an Auditing Committee of three members, to be composed of the chief accounting officers

of three of the Railway Companies, to serve for the fiscal year in which they shall be appointed. It shall be the duty of the Auditing Committee to recommend to the Board of Directors from time to time such changes in the form of accounts of the Terminal Company as they may deem necessary or proper. The Auditing Committee shall from time to time audit and check the accounts of the Terminal Company and report to the Board of Directors.

Article III

The parties hereto severally covenant and agree with each other as follows:

Exclusive management by Terminal Co.

Section 1. The Terminal Company shall have the exclusive management and control of the operation, maintenance, repair and renewal of the Terminal Facilities and every part thereof, and shall establish rules and regulations governing the operation of trains within and upon the Terminal Facilities and the use and enjoyment thereof in all other respects; provided, always, that such rules and regulations shall be fair and equitable and shall apply equally and without discrimination to all the Railway Companies using the Terminal Facilities. The Railway [fol. 37] Companies agree to comply, and cause their employes to comply, with such rules and regulations.

Employes may be removed.

Sec. 2. If any employe of the Terminal Company (not including a President or other general or executive officer) shall be deemed by any of the Railway Companies to be incompetent, negligent or guilty of unfairness or discrimination, or otherwise unfit for the performance of his duties, such Railway Company or Companies shall deliver to the Terminal Company a written demand for the removal of such employe, specifying the reason for such removal, and thereupon the Terminal Company shall dismiss such employe forthwith.

Plan, etc., of terminal facilities.

Sec. 3. The plan, character and cost of the Terminal Facilities to be erected and provided hereunder shall, subject to the provisions of Section 1 of Article I hereof, be determined by the Board of Directors of the Terminal Company.

Exclusive facilities to be furnished

Sec. 4. In case any one or more (less than all) of the Railway Companies, parties hereto, or any other railway

company, shall desire any addition to be made to the Terminal Facilities of which addition it or they shall have the exclusive use, the Terminal Company may make such addition and grant the right to such exclusive use upon the following conditions in this Section 4 expressed, but not otherwise, viz.:

upon certain conditions.

(a) That the Company or Companies to which such right of exclusive use of part of the Terminal Facilities shall be granted shall enter into an agreement with the Terminal Company and thereby obligate itself or themselves to pay, during the term of such grant, for the right so granted (1) sums equal to interest on the fair value to be fixed in such agreement of the portion of the Terminal Facilities so to be used exclusively, including all improvements thereon; (2) sums equal to all taxes, rates, levies, benefits, assess-
[fol. 38] ments and other governmental charges upon the property so to be used exclusively; and (3) all expenses incurred by the Terminal Company in the operation, maintenance, renewal or repair of the property so to be used exclusively; and

(b) That each of the Railway Companies not then in default shall have consented in writing to the grant by the Terminal Company of such right of exclusive use and to the period for which the same shall be granted and to the other terms and provisions of such agreement.

Use by other R. R. Co's.

Sec. 5. Except when and to the extent required by law, the Terminal Company shall not grant to any other railway company the right to use the said Terminal Facilities unless not less than two-thirds of the Railway Companies parties hereto not then in default shall consent thereto in writing.

What payments are to cover.

Sec. 6. It is understood and agreed that the payments to be made by the Railway Companies under Section 6 of Article II hereof shall cover only the use and enjoyment of the Terminal Facilities and such services as are for the common benefit of the Railway Companies using the Terminal Facilities—such as the care of passengers in and about the train sheds and waiting rooms of said Union Passenger Station; the sale of tickets and the handling of baggage and mail thereat; the heating and lighting thereof; the maintenance and operation of tracks, switches, gates, towers, interlocking plants, etc., and generally the

management, supervision, maintenance and care of all the Terminal Facilities; but that all supplies which may be furnished by the Terminal Company to any of the parties hereto for their cars—such as water, ice, oil, gas, fuel, or supplies of any other nature—and all labor and material for repairing or for cleaning of cars; fuel, water and supplies for engines; care and attention of engines in [fol. 39] roundhouse; labor and material for cleaning and repair of cars; repairing engines and any and all such services, supplies or material shall be furnished in each instance at the sole cost, charge and expense of the particular Railway Company for which the same shall be furnished, and each of the Railway Companies agrees to pay to the Terminal Company, promptly upon statements being rendered to it therefor, the actual cost of all such supplies, materials, labor and services furnished or rendered to it, and any errors or omissions in any such statement may be corrected in subsequent statements.

None of the Railway Companies shall in any way obstruct or interfere with the access to and use of said Terminal Facilities by the parties hereto or by other railway companies having the right to use the same, or in any way obstruct or interfere with the execution or enforcement of all reasonable rules and regulations that may be established by the Terminal Company governing the use and enjoyment of the Terminal Facilities.

Ry. Co's not to obstruct use of facilities.

Sec. 7. The Terminal Company shall pay, satisfy and discharge all losses, damages, charges, costs, expenses and liabilities (including liabilities for loss or damage to property and injury or death to persons and including loss by embezzlement or other dishonesty of employes), which shall be suffered or incurred by the parties hereto, or by any other corporation or person, through or by reason of any negligence, carelessness, misconduct or other fault of the Terminal Company, or of any of its officers, agents, employes or servants in the management, operation, maintenance, repair, betterment, extension and renewal of the Terminal Facilities; and all sums paid by the Terminal Company under this clause shall be included as part of [fol. 40] the maintenance and operating expenses as provided for in Section 6 of Article II, and shall be paid accordingly.

Loss and damage caused by Terminal Co.

Compromise of claims.

Any claim against the Terminal Company based upon alleged liability which would be chargeable to the maintenance and operating expenses hereunder may be settled, compromised or satisfied by the Terminal Company on such terms as it may deem expedient, either before or after legal proceedings shall have been instituted in respect to such claim, and any sums paid in settlement, compromise or satisfaction of such claim shall be included as a part of said maintenance and operating expenses.

Loss and damage caused by Ry. Co's.

Sec. 8. Each of the Railway Companies shall pay, satisfy and discharge all claims and liabilities for losses, damages, charges, costs and expenses (including liabilities for loss or damage to property and injury or death of persons) suffered or incurred by the Terminal Company or by any party hereto or by any other railway company using the Terminal Facilities, or by any other corporation or person, through or by reason of any negligence, carelessness, omission or wrongful act of such Railway Company or of any of its officers, agents, employes or servants.

Destruction of Union Station.

Sec. 9. In case said Union Passenger Station shall be injured or destroyed by fire or other cause the Terminal Company shall and will repair and restore or rebuild the same upon substantially the same site and in accordance with plans which shall first have been approved by the President or some other executive officer of each of not less than two-thirds of the Railway Companies not then in default. Such work of repairing and restoring or rebuilding shall be begun as soon as it reasonably may be after such injury or destruction and shall be prosecuted continuously until completion. Pending such restoration or rebuilding such temporary arrangements as may be practicable shall be [fol. 41] made by the Terminal Company for the accommodation of the Railway Companies and there shall be no deductions in any of the payments to be made hereunder by the Railway Companies, by reason of such injury or destruction of said Union Passenger Station.

When facilities ready for use.

Sec. 10. The Terminal Company shall give to each of the Railway Companies thirty days' notice in writing of the date upon which the Terminal Facilities will be completed and ready for use hereunder, and each of the Railway Companies agrees that it will, on the terms of this agreement and during the term thereof, run into said Union Passenger

Station all its passenger, mail and express trains destined to or departing from said City of Kansas City, except suburban passenger trains originating at or destined to points within a radius of fifty miles from the Union Passenger Station; provided, however, and it is expressly understood and agreed by and between the parties hereto that the passenger station facilities to be furnished hereunder by the Terminal Company shall at all times be adequate for the accommodation of the passenger, mail and express business of each of the Railway Companies, except the suburban trains aforesaid.

Leased and owned companies included.

The rights herein granted by the Terminal Company are for the trains of the Railway Companies parties hereto, and for the trains of any Railway Company, whose railway shall be, at the time, leased to and operated by any of the Railway Companies parties hereto, its or their successors or assigns, and for the trains of any Railway Company, a majority of whose capital stock shall be at the time owned by any of the Railway Companies parties hereto, its or their successors or assigns, but do not include the right to use such Terminal Facilities by or for the trains [fol. 42] of any other railway companies. All trains, engines and cars operated as aforesaid by any of the Railway Companies and run by it into or upon said Terminal Facilities shall, for the purposes of this agreement, be deemed the trains, engines and cars of such Railway Company operating the same.

Covenants hereunder several and not joint.

Sec. 11. It is expressly understood and agreed that all of the covenants and agreements to be performed by the said Railway Companies under this agreement are several and not joint, and in no event shall either of said Railway Companies be liable for any default of any of the others, except as herein expressly provided.

Amendments.

It is further expressly understood and agreed that this agreement shall not be altered or in any wise modified or amended, without the consent in writing of each of the parties of the first and second parts hereto; provided, however, that the consent in writing of the Trustee Company, shall be also required before any modification shall be made or any provision hereof relating to the payments to be made under Section 1 of Article II hereof.

Assignment.

Sec. 12. The several covenants, conditions and stipulations of this agreement shall be binding upon and inure

to the benefit of the respective parties hereto, their successors, lessees and assigns. No assignment by any of the Railway Companies of any interest or right under this agreement, whether in connection with the sale of the assigning Railway Company's railway and other property or otherwise, shall release such assigning Railway Company from any of its obligations under this agreement. If any of the Railway Companies should be consolidated, the consolidated company shall be liable to make all payments [fol. 43] and to perform all obligations hereunder which would be obligatory upon each of the constituent companies if such consolidation had not been made.

Consolidation.

Default by Ry. Co.

Sec. 13. If any of the Railway Companies shall fail to pay any sum payable by it hereunder on or before the date when the same shall become due, or shall fail to perform or to comply with any other covenant or condition by it to be performed or complied with under this agreement, and such default shall continue for a period of thirty days after written demand for such payment, performance or compliance shall have been made upon such Railway Company by the Terminal Company, then and in any such case the Terminal Company shall have, and hereby is given, the right at its election to exclude such Railway Company from the use of the Terminal Facilities, and upon giving notice in writing of such election to such Railway Company, all rights of such Railway Company to use the Terminal Facilities shall then and there, by such notice, be terminated and the Terminal Company may exclude such Railway Company wholly from the Terminal Facilities; but such termination shall not relieve any party hereto from any liability that may have accrued prior to the date of such termination or deprive any party of the right to enforce any such liability, and such termination of the rights of one or more of the Railway Companies shall not affect the rights or obligations of any of the other Railway Companies whose rights have not been so terminated. Nevertheless, if the Railway Company in default, within thirty days after receipt of any statement rendered to it hereunder by the Terminal Company, shall give notice in writing to the Terminal Company that it contests the correctness of any specified item or items in such statement and shall pay [fol. 44] to the Terminal Company all sums other than the item or items so specified, and also, if demanded by the Terminal Company, shall furnish adequate security for

Exclusion of defaulting Co.

the contested item or items, then so long as such Railway Company in good faith shall contest the correctness of the item or items specified in such notice, the right of the Railway Company to use the Terminal Facilities shall not be terminated under this section by reason of the failure of such Railway Company to pay in full such item or items so contested. But no such notice, exclusion or termination shall relieve such Railway Company from the payments, to be made by it as in Section 1, Article II hereof provided; it being agreed and understood as a part of the consideration for this agreement that each of the Railway Companies parties hereto binds itself to make such payments absolutely and at all events.

In case such default of any Railway Company shall be in respect of payments to be made under Section 1, Article II, and shall continue for a period of thirty days after written demand for such payment, performance or compliance shall have been made upon such Railway Company by the Terminal Company, then and in any such case the Terminal Company shall, anything herein contained to the contrary notwithstanding, upon request in writing of any other one or more of the Railway Companies not in default, exercise the right hereinbefore in this Section 13 given, and wholly exclude such Railway Company so in default from the use of the Terminal Facilities.

Reinstatement of defaulting Co.

In case any of the Railway Companies shall be excluded from the use of the Terminal Facilities under this Section 13, such Railway Company shall be entitled, at any time within a period of one year after such exclusion, but no longer, to be reinstated to the use and enjoyment of all the [fol. 45] rights and privileges granted to it hereunder upon payment within such year to the Terminal Company of all sums for which it is in arrears, with interest thereon from the date such sums became due respectively at the rate of seven per cent. per annum, payable semi-annually on the first day of January and July in each year, together with interest at the rate of seven per cent. per annum on the overdue installments of interest and upon compliance with such other conditions and considerations as the Directors of the Terminal Company may impose.

Schedules, time tables, etc.

Sec. 14. It is mutually understood and agreed that while each of the Railway Companies shall have the right to arrange its own schedules and time tables, this right shall be judiciously, fairly and equitably exercised by each so as

not to produce unnecessary inconvenience to any other of the Railway Companies. Should a dispute arise between the Railway Companies or any of them as to the arrangement of trains, the use of the Terminal Facilities or the time table or train schedule of the Railway Companies, the Terminal Company expressly reserves the power to determine and enforce the proper arrangement and order of trains, the proper use of the Terminal Facilities, and the proper arrangement of such time tables or train schedules, and to direct the adoption thereof and, if in its judgment it shall be necessary for the safe and proper conduct of the traffic over and upon the Terminal Facilities, the Terminal Company shall have the right of regulating or prescribing the rate of speed or movement of trains therein and thereon.

Article IV

Certain prior contracts.

Whereas, The Kansas City Belt Railway Company has heretofore made and entered into certain agreements which are here referred to and made a part hereof, as follows:

With St. Paul Co.

[fol. 46] (1) An agreement dated the thirty-first day of May, 1887, between The Kansas City Belt Railway Company and the Chicago, Wilwaukee and St. Paul Railway Company, which is now in full force and effect and all the rights under which are held, possessed and enjoyed by the St. Paul Company;

With Atchison Co.

(2) An agreement dated the thirty-first day of May, 1888, between The Kansas City Belt Railway Company, Chicago, Santa Fe and California Railway Company, and Atchison, Topeka and Santa Fe Railroad Company, which is now in full force and effect and all the rights under which have been acquired and are now held, possessed and enjoyed by the Atchison Company;

With Atchison Co.

(3) An agreement dated the first day of April, 1889, between The Kansas City Belt Railway Company, Chicago, Santa Fe and California Railway Company, and Atchison, Topeka and Santa Fe Railroad Company, which is now in full force and effect and all the rights under which have been acquired and are now hold, possessed and enjoyed by the Atchison Company;

With Rock Island Co.

(4) An agreement dated the first day of April, 1904, between The Kansas City Belt Railway Company and the

Rock Island Company, which is now in full force and effect; and

Whereas, by each of said agreements except the agreement with the Rock Island Company it is provided that the term thereof shall continue for a period of ninety-nine years after its date, and in and by said agreement with the Rock Island Company it is provided that the term thereof may be discontinued by six months' notice in writing; and

Whereas, the Terminal Company is the owner of the entire outstanding capital stock of The Kansas City Belt Railway Company, except Seven shares held by directors thereof and has acquired title to all the property of The [fol. 47] Kansas City Belt Railway Company, including said four agreements and has assumed and agreed to perform and carry out all the duties and obligations of The Kansas City Belt Railway Company, under said four agreements and each of them:

Now, therefore, in consideration of the execution of this present agreement by the Atchison Company, the St. Paul Company and the Rock Island Company, and of the payments to be made by said companies respectively hereunder, the Terminal Company covenants and agrees to and with each of said three last mentioned railway companies as follows:

Terms of old agreements extended.

Section 1. That the term of each of said four agreements shall be and the same hereby extended for two hundred and fifty years from and after the date when the Terminal Facilities shall be ready for use, as in Section 10 of Article III hereof provided.

Sec. 2. That, so long as this agreement continues in force and effect, the St. Paul Company, the Atchison Company and the Rock Island Company shall be and hereby are and each of them is released from all obligations to make any payment of rental or other payment whatsoever under said agreements or any of them, except as expressly provided in Section 8 of Article I hereof.

Equivalent facilities, etc., to be furnished

Sec. 3. That so long as this agreement continues in force and effect the Terminal Company shall, and hereby covenants and agrees that it will, anything in Section 4 of Article I hereof or elsewhere herein contained to the contrary notwithstanding, furnish the St. Paul Company, the

Atchison Company and the Rock Island Company, and each of them, the same or equivalent trackage facilities for the transaction of the freight business of each to and from its present freight terminals in Kansas City and [fol. 48] through Kansas City as each is entitled to under said four agreements, or any of them, and in case of the failure of the Terminal Company to furnish such trackage facilities over other tracks than those acquired from The Kansas City Belt Railway Company, then the St. Paul Company, the Atchison Company and the Rock Island Company each shall have and is hereby granted the right, at its option, to run and operate its freight cars and trains over the tracks acquired from The Kansas City Belt Railway Company, or tracks located substantially as such tracks are now located, for the transaction of such freight business of each.

Waiver of rights under old agreements, while this agreement in effect.

Sec. 4. It is hereby expressly understood and agreed by and between the parties hereto that so long as this agreement continues in force and effect as to all or any of the parties hereto, the said Atchison Company, the St. Paul Company and the Rock Island Company shall not claim, or be entitled to, any rights or privileges under said four agreements, but all rights and privileges in connection with the use of any property now owned or hereafter acquired by the Terminal Company and all rights to any service, privilege or advantage of any kind in connection with said property, shall so long as this agreement continues in force and effect be held and asserted only by said St. Paul Company, said Atchison Company and said Rock Island Company under this agreement; and in consideration of the extension of the time of said four written agreements and the execution of this agreement by the other companies, said Atchison Company, said St. Paul Company and said Rock Island Company hereby expressly waive any rights, privileges or advantages in connection with any of said property of said Terminal Company, or any service connected therewith during the time this agreement continues in force and [fol. 49] effect which are not enjoyed in common by all the other Railway Companies, parties hereto, except as hereinbefore in this Article IV provided. It being distinctly understood and agreed that, except as hereinbefore in this Article IV provided, all the Railway Companies shall so long as this agreement continues in force and effect, and

no longer, enjoy equal privileges and facilities, and that none of the Railway Companies shall have or possess any rights, privileges or advantages other or different from those enjoyed by all the other Railway Companies, and that none of the Railway Companies shall be subject to any charge or burden other than or different from that to which all the other Railway Companies are subject.

Sec. 5. It is further expressly understood and agreed that during the period of construction of said Union Passenger Station and of any re-arrangement of the Terminal Facilities or the construction of additions, extensions or improvements thereto, such rearrangement or construction shall be so carried on as not to seriously interrupt or interfere with the use of the Terminal Facilities by the St. Paul, the Atchison and the Rock Island Companies, respectively, under said four agreements.

Article V

Agreement assigned to mortgage trustees.

This agreement is hereby transferred and assigned to the Trustees under said First Mortgage of the Terminal Company by way of further security for the bonds issued under and secured by said mortgage and such other bonds as may be issued in accordance with the terms thereof, and it is hereby covenanted and agreed by and between the parties hereto that this agreement is subject to the lien of said First Mortgage, and that said Trustee Company shall have the right and power in its own discretion to enforce and require the enforcement of any and every covenant herein contained, the breach of which may in its judgment affect or impair the rights or security of said Trustees or [fol. 50] the bondholders represented by them; and the Terminal Company hereby expressly agrees to protect and hold said Trustees harmless from every expense, liability, claim, charge, action or demand which might impair the validity of this agreement, the right or security of said Trustees or the bondholders represented by them or which may be incurred by said Trustees in protecting their rights and security and those of the bondholders represented by them; and it is expressly understood and agreed that said Trustees, respectively, in exercising the powers conferred by this Article V, shall not in any manner be responsible or liable for any act, default or misconduct of any officer, agent or other person employed by the Trustees, except for willful default or misconduct.

"Trustee Company" defined.

Except when otherwise indicated, the words "Trustee Company," or any other equivalent term, as used in this Indenture are intended and shall be held to designate the Trustee Company under the said First Mortgage of the Kansas City Terminal Railway Company, and any successor trustee company under said First Mortgage and such successor trustee company shall have and is hereby granted the respective rights hereunder of the Trustee Company named in said First Mortgage.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents thereunto duly authorized and their respective corporate seals to be hereto affixed and attested by their respective Secretaries the day and year first above written.

[fol. 51] Kansas City Terminal Railway Company, (Signed) by Horatio L. Harmon, Its President. (Seal.)

Attest: (Signed) C. C. Ripley, Secretary.

The Atchison, Topeka and Santa Fe Railway Company, (Signed) by E. P. Ripley, Its President. (Seal.)

Attest: (Signed) Edward McBride, Assistant Secretary.

Chicago, Milwaukee and St. Paul Railway Company, (Signed) by A. J. Earling, Its President. (Seal.)

Attest: (Signed) T. C. Sherman, Assistant Secretary.

The Chicago, Rock Island and Pacific Railway Company, (Signed) by B. L. Winchell, Is President. (Seal.)

Attest: (Signed) Geo. H. Crosby, Secretary.

[fol. 52] St. Louis and San Francisco Railroad Company, (Signed) by A. J. Davidson, Its President. (Seal.)

Attest: (Signed) F. W. Young, Assistant Secretary.

Union Pacific Railroad Company, (Signed) by R. S. Lovett, Its Vice-President. (Seal.)

Attest: (Signed) Jos. Hellen, Assistant Secretary.

The Chicago and Alton Railroad Company, (Signed) by Geo. H. Ross, Its Vice-President. (Seal.)

Attest: (Signed) J. Steuart Mackie, Secretary.

The Wabash Railroad Company, (Signed) by F. A. Delano, Its President. (Seal.)

Attest: (Signed) E. B. Pryor, Assistant Secretary.

[fol. 53] Missouri, Kansas and Texas Railway Company, (Signed) by A. A. Allen, Vice-President and General Manager. (Seal.)

Attest: (Signed) C. N. Whitehead, Secretary.

The Missouri Pacific Railway Company, (Signed) by C. S. Clarke, Its Vice-President. (Seal.)

Attest: F. W. Irland, Assistant Secretary.

Chicago, Burlington and Quincy Railroad Company, (Signed) by Geo. B. Harris, Its President. (Seal.)

Attest: (Signed) H. W. Weiss, Assistant Secretary.

Illinois Trust and Savings Bank, as Trustee, (Signed) by Chauncey Keep, Its Vice-President. (Seal.)

Attest: (Signed) William H. Henkle, Secretary.

[fol. 54] State of Missouri,
County of Jackson, ss:

On this 12th day of June, in the year 1909, before me appeared Horatio L. Harmon, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Kansas City, in the State of Missouri; that he is the president of Kansas City Terminal Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order

of its board of directors, and that he signed his name thereto by like order; and said Horatio L. Harmon acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Grace L. Forbes, Notary Public, Jackson County, Missouri. My commission expires on the 2nd day of May, 1912. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 20th day of July, in the year 1909, before me personally came E. P. Ripley, to me personally known, who being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that [fol. 55] he is the president of The Atchison, Topeka and Santa Fe Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said E. P. Ripley acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Agnes K. Donohue, Notary Public, Cook County, Illinois. My commission expires on the 22nd day of May, 1911. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 8th day of July, in the year 1909, before me personally came A. J. Earling, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of Chicago, Milwaukee and St. Paul Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was

signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said A. J. Earling acknowledged [fol. 56] said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) W. D. Millard, Notary Public, Cook County, Illinois. My commission expires on the 11th day of May, 1912. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 25th day of June, in the year 1909, before me personally came B. L. Winchell, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of The Chicago, Rock Island and Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said B. L. Winchell acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) C. Nyquest, Notary Public, Cook County, Illinois. My commission expires on the 5th day of August, 1911. (Seal.)

[fol. 57] STATE OF MISSOURI,
City of St. Louis, ss:

On this 21st day of August, in the year 1909, before me personally came A. J. Davidson, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of St. Louis, in the State of Missouri; that he is the president of St. Louis and San Francisco Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said

instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said A. J. Davidson acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Arthur E. Haid, Notary Public, City of St. Louis, Missouri. My commission expires on the 10th day of April, 1912. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of August, in the year 1909, before me personally came R. S. Lovett, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of New York, in the State of New York; that he is the vice-president of Union Pacific Railroad Company, one of the corporations described in and [fol. 58] which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said R. S. Lovett acknowledged said instrument to be the free act and deed of said corporation.

(Signed) L. Elwell, Notary Public, New York County, New York. My commission expires on the 30th day of March, 1910. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 15th day of July, in the year 1909, before me personally came George H. Ross, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is vice-president of The Chicago and Alton Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument

is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said George H. Ross acknowledged said instrument to be the free act and deed of said corporation. [fol. 59] In Witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Harry K. McEvoy, Notary Public, Cook County, Illinois. My commission expires on the 21st day of March, 1911. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 25th day of June, in the year 1909, before me personally came F. A. Delano, to me personally known, who being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of The Wabash Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said F. A. Delano acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Vallie H. Rued, Notary Public, Cook County, Illinois. My commission expires on the 26th day of January, 1913. (Seal.)

[fol. 60] STATE OF MISSOURI,
County of St. Louis, ss:

On this 18th day of September, in the year 1909, before me personally came A. A. Allen, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Dallas, in the State of Texas; that he is the vice-president of Missouri, Kansas and Texas Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instru-

ment is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said A. A. Allen acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Lee W. Hagerman, Notary Public, City of St. Louis, Mo. My commission expires on the 15th day of March, 1912. (Seal.)

STATE OF MISSOURI,
City of St. Louis, ss:

On this 21st day of September, in the year 1909, before me personally came C. S. Clarke, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of St. Louis, in the State of Missouri; that he is the vice-president of The Missouri Pacific Rail-[fol. 61] way Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said C. S. Clarke acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Margaret Lally, Notary Public, City of St. Louis, Missouri. My commission expires on the 11th day of January, 1913. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 22nd day of July, in the year 1909, before me personally came George B. Harris, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of the Chicago, Burlington and Quincy Railroad Company, one of the corporations described in

and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said George B. [fol. 62] Harris acknowledged said instrument to be the free act and deed of said corporation.

In Witness whereof, I have hereunto set my hand and affixed my official seal of the day and year aforesaid.

(Signed) J. H. Pettibone, Notary Public, Cook County, Illinois. My commission expires on the 12th day of March, 1910. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this fourth day of March, in the year 1910, before me personally came Chauncey Keep, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the vice-president of Illinois Trust and Savings Bank, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said Chauncey Keep acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Signed) Morris Berger, Notary Public, Cook County, Illinois. My commission expires on the 26th day of May, 1912. (Seal.)

[fol. 63] First Supplemental Operating Agreement between Kansas City Terminal Railway Company, of the first part, and The Kansas City Southern Railway Company, and Chicago Great Western Railroad Company, of the second part, and The Atchison, Topeka and Santa Fe Railway Company, Chicago, Milwaukee and St. Paul

Railway Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis and San Francisco Railroad Company, Union Pacific Railroad Company, The Chicago and Alton Railroad Company, The Wabash Railroad Company, Missouri, Kansas and Texas Railway Company, The Missouri Pacific Railway Company, and Chicago, Burlington and Quincy Railroad Company, of the third part, and Illinois Trust and Savings Bank, as Trustee, of the fourth part.

Relating to Union Passenger Station and Other Terminal Facilities at Kansas City

Dated January 24th, 1910.

[fol. 64] Indenture, made this twenty-fourth day of January, 1910, by and between Kansas City Terminal Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri (hereinafter called the Terminal Company), party of the first part; The Kansas City Southern Railway Company, a corporation of the State of Missouri, and Chicago Great Western Railroad Company, a corporation of the State of Illinois (hereinafter collectively called the New Companies), parties of the second part; The Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas; Chicago, Milwaukee and St. Paul Railway Company, a corporation of the State of Wisconsin; The Chicago, Rock Island and Pacific Railway Company, a corporation of the States of Illinois and Iowa; St. Louis and San Francisco Railroad Company, a corporation of the State of Missouri; Union Pacific Railroad Company, a corporation of the State of Utah; The Chicago and Alton Railroad Company, a corporation of the State of Illinois; The Wabash Railroad Company, a consolidated corporation organized under the laws of the State of Missouri and other states; Missouri, Kansas and Texas Railway Company, a corporation of the State of Kansas; The Missouri Pacific Railway Company, a consolidated corporation organized under the laws of the States of Missouri, Kansas and Nebraska, and Chicago, Burlington and Quincy Railroad Company, a corporation of the State of Illinois (hereinafter collectively called the Old Companies, parties of the third part, and Illinois Trust and Savings Bank, a corporation of the

State of Illinois (hereinafter called the Trustee Company), party of the fourth part:

Whereas, the parties of the first, third and fourth parts have heretofore on the 12th day of June, 1909, entered [fol. 65] into a certain agreement, relating to a Union Passenger Station, and other Terminal Facilities at Kansas City (to which this contract is supplemental), which agreement is hereinafter referred to as the "Operating Agreement;" and

Whereas, the New Companies severally desire to be admitted to the joint use of the Union Passenger Station and all the Terminal Facilities referred to in the Operating Agreement upon the terms and conditions named therein, and all of the other parties hereto are willing that they shall be so admitted to the same extent and with like effect as though they had been parties to the Operating Agreement originally;

Now, Therefore, the parties hereto do mutually covenant and agree with each other as follows:

First: The Terminal Company will and does hereby give and grant to each of the New Companies the right to the joint use of the Union Passenger Station and all the Terminal Facilities named and provided for in the Operating Agreement in common with the other Railway Companies now or hereafter entitled to use the same, for the full period of time named therein, and upon the terms and conditions thereof, to the same extent and with like effect as though the New Companies, and each of them, had been parties to the Operating Agreement originally, except that the obligation of the New Companies, and each of them, to make the payments required to be made under Section 1 of Article II of the Operating Agreement shall be one-twelfth of the whole instead of one-tenth thereof:

Second: The payments required to be made by each of the Old Companies, parties of the third part, under the provisions of Section 1 of Article II of the Operating Agreement shall be reduced as contemplated therein, so that each of the Old Companies, originally parties to the [fol. 66] Operating Agreement, shall pay from time to time a sum equal to one-twelfth of the whole payments re-

quired to be made in said Section 1 of Article II instead of one-tenth of such payments, as therein provided.

Third: It is the intention of the parties hereto and the purpose in the execution of this First Supplemental Operating Agreement that the New Companies, respectively, shall assume all the covenants and agreements contained in the Operating Agreement in favor of each other, in favor of the Old Companies, respectively, in favor of the Terminal Company and in favor of the Trustee Company, and that they shall, and do hereby, become parties to the Operating Agreement with like force and effect as if they had executed the same as parties thereto as of the date upon which the Operating Agreement was executed by the then parties thereto. The Old Companies, respectively, the Terminal Company and the Trustee Company do hereby reaffirm their covenants and agreements therein contained and extend the same to and with the New Companies, respectively, to the same extent and with like effect as though the New Companies had been parties thereto originally.

Fourth: The covenants and agreements hereof made by the parties of the second and third parts are several and not joint.

Fifth: This agreement is hereby transferred and assigned to the Trustees under the first mortgage of the Terminal Company to the same extent and with like effect as provided in Article V of the Operating Agreement.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents or Vice-Presidents thereunto duly authorized, and their respective corporate seals to be hereto affixed and attested by their respective Secretaries or Assistant Secretaries the day and year above written.

[fol. 67] Kansas City Terminal Railway Company, by H. L. Harmon, Its President. (Seal.)

Attest: C. C. Ripley, Secretary.

The Atchison, Topeka and Santa Fe Railway Company, by J. W. Kendrick, Its Vice President. (Seal.)

Attest: Edward McBride, Assistant Secretary.

Chicago, Milwaukee and St. Paul Railway Company, by A. J. Earling, Its President. (Seal.)

Attest: E. W. Adams, Secretary.

The Chicago, Rock Island and Pacific Railway Company, by H. U. Mudge, Its President. (Seal.)

Attest: Geo. H. Crosby, Secretary.

St. Louis and San Francisco Railroad Company, by B. L. Winchell, Its President. (Seal.)

Attest: F. H. Hamilton, Secretary.

[fol. 68] Union Pacific Railroad Company, by R. S. Lovett, Its President. (Seal.)

Attest: Alex Millar, Secretary.

The Chicago and Alton Railroad Company, by Geo. H. Ross, Its Vice-President. (Seal.)

Attest: H. E. R. Wood, Assistant Secretary.

The Wabash Railroad Company, by F. A. Delano, Its President. (Seal.)

Attest: E. B. Pryor, Assistant Secretary.

Missouri, Kansas and Texas Railway Company, by A. A. Allen, Its President. (Seal.)

Attest: C. N. Whitehead, Secretary.

The Missouri Pacific Railway Company, by C. S. Clarke, Its Vice-President. (Seal.)

Attest: F. W. Irland, Assistant Secretary.

[fol. 69] Chicago, Burlington and Quincy Railroad Company, by D. Miller, Its Vice-President. (Seal.)

Attest: H. W. Weiss, Assistant Secretary.

Chicago Great Western Railroad Company, by S. M. Felton, Its President. (Seal.)

Attest: J. F. Coykendall, Secretary.

The Kansas City Southern Railway Company, by J. A. Edson, Its President. (Seal.)

Attest: R. J. McCarty, Assistant Secretary.

Illinois Trust and Savings Bank, as Trustee, by Frederick T. Haskell, Its President. (Seal.)

Attest: William H. Henkle, Secretary.

[fol. 70] STATE OF MISSOURI,
County of Jackson, ss:

On this 3rd day of March, in the year 1910, before me appeared Horatio L. Harmon, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Kansas City, in the State of Missouri, that he is the President of Kansas City Terminal Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said Horatio L. Harmon acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Grace L. Forbes, Notary Public, Jackson County, Missouri. My commission expires on the 2nd day of May, 1912. (Seal.)

[fol. 71] STATE OF ILLINOIS,
County of Cook, ss:

On this 30th day of March, in the year 1910, before me appeared J. W. Kendrick, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the Vice-President of The Atchison, Topeka and Santa Fe Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by

order of its Board of Directors, and that he signed his name thereto by like order; and said J. W. Kendrick acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Agnes K. Donohue, Notary Public, Cook County, Illinois. My commission expires on the 22nd day of May, 1911. (Seal.)

[fol. 72] STATE OF ILLINOIS,
County of Cook, ss:

On this 14th day of April, in the year 1910, before me appeared A. J. Earling, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of Chicago, Milwaukee and St. Paul Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said A. J. Earling acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

W. D. Millard, Notary Public, Cook County, Illinois. My commission expires on the 11th day of May, 1912. (Seal.)

[fol. 73] STATE OF ILLINOIS,
County of Cook, ss:

On this 26th day of April, in the year 1910, before me appeared H. U. Mudge, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of The Chicago, Rock Island and Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by

order of its Board of Directors, and that he signed his name thereto by like order; and said H. U. Mudge acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

C. Nyquist, Notary Public, Cook County, Illinois. My commission expires on the 15th day of August, 1911. (Seal.)

[fol. 74] State of Missouri,
City of St. Louis, ss:

On this 17th day of May, in the year 1910, before me appeared B. L. Winchell, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of St. Louis and San Francisco Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said B. L. Winchell acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have herunto set my hand and affixed my official seal the day and year aforesaid.

Kate L. Worley, Notary Public, City of St. Louis, Missouri. My commission expires on the 22nd day of November, 1911. (Seal.)

[fol. 75] State of New York,
County of New York, ss:

On this 2nd day of June, in the year 1910, before me appeared R. S. Lovett, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of New York, in the State of New York; that he is the President of Union Pacific Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of

Directors, and that he signed his name thereto by like order; and said R. S. Lovett acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

L. Elwell, Notary Public, New York County, New York. My commission expires on the 30th day of March, 1911. (Seal.)

[fol. 76] STATE OF ILLINOIS,
County of Cook, ss:

On this 19th day of April, in the year 1910, before me appeared George H. Ross, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is Vice-President of The Chicago and Alton Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said George H. Ross acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Robt. J. Bell, Notary Public, Cook County, Illinois. My commission expires on the 23rd day of February, 1911. (Seal.)

[fol. 77] STATE OF ILLINOIS,
County of Cook, ss:

On this 29th day of April, in the year 1910, before me appeared F. A. Delano, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of The Wabash Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said

F. A. Delano acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

John De La Mater, Notary Public, Cook County, Illinois. My commission expires on the 12th day of August, 1913. (Seal.)

[fol. 78] STATE OF MISSOURI,
City of St. Louis, ss:

On this 5th day of May, in the year 1910, before me appeared A. A. Allen, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Dallas, in the State of Texas; that he is the President of Missouri, Kansas and Texas Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said A. A. Allen acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Claude O. Pearcy, Notary Public, City of St. Louis, Missouri. My commission expires on the 17th day of December, 1910. (Seal.)

[fol. 79] STATE OF MISSOURI,
City of St. Louis, ss:

On this 30th day of April, in the year 1910, before me appeared C. S. Clarke, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of St. Louis, in the State of Missouri; that he is the Vice-President of The Missouri Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order;

and said C. S. Clarke acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

George C. Donevan, Notary Public, City of St. Louis, Missouri. My commission expires on the 9th day of November, 1911. (Seal.)

[fol. 80] STATE OF ILLINOIS,
County of Cook, ss:

On this 28th day of April, in the year 1910, before me appeared D. Miller, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of the Chicago, Burlington and Quincy Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said D. Miller acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

J. H. Pettibone, Notary Public, Cook County, Illinois. My commission expires on the third day of March, 1914. (Seal.)

[fol. 81] STATE OF ILLINOIS,
County of Cook, ss:

On this 24th day of February, in the year 1910, before me appeared S. M. Felton, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of the Chicago Great Western Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto

by like order; and said S. M. Felton acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Charles G. Lavery, Notary Public, Cook County, Illinois. My commission expires on the 5th day of November, 1913. (Seal.)

[fol. 82] State of Missouri,
County of Jackson, ss:

On this 4th day of March, in the year 1910, before me appeared J. A. Edson, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Kansas City, in the State of Missouri; that he is the President of The Kansas City Southern Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said J. A. Edson acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Clarence R. Hall, Notary Public, Jackson County, Missouri. My commission expires on the 15th day of October, 1912. (Seal.)

[fol. 83] County of Cook,
State of Illinois, ss:

On this 2nd day of February, in the year 1911, before me appeared Frederick T. Haskell, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the Vice-President of Illinois Trust and Savings Bank, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that such instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and

said Frederick T. Haskell acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Morris Berger, Notary Public, Cook County, Illinois.

My commission expires on the 26th day of May, 1912. (Seal.)

[fol. 84] EXHIBIT 2 TO PETITION

Statement showing amount of First Mortgage Bond interest of Kansas City Terminal Railway Company (less credits from operations) and its taxes for the year 1932 as charged to the proprietary and using companies on unit basis, and the amounts thereof chargeable to each if apportioned on ratio of use, determined from proportion of joint operating expenses charged to each during the year 1932.

	Bond interest	Credit from operations	Net	Taxes	As charged total	Percent of use based on aggregate jt. operating exp. paid 1932	Use basis proportion	Increase or decrease if apportioned on use basis
A. T. & S. F.	$165,821.03	$11,178.80	$154,642.23	$40,661.33	$195,303.56	26.06	$599,655.32	$404,351.76
Alton	165,821.02	15,558.59	150,262.43	40,661.33	190,923.76	4.95	113,902.30	Cr. 77,021.46
C. B. & Q.	165,821.02	14,734.20	151,086.82	40,661.33	191,748.15	8.60	197,890.86	6,142.71
C. G. W.	165,821.02	15,645.39	150,175.63	40,661.33	190,836.96	2.61	60,057.57	Cr.130,779.39
C. M. St. P. & P.	165,821.02	15,675.69	150,145.33	40,661.33	190,806.66	2.64	60,747.89	Cr.130,058.77
C. R. I. & P.	165,821.02	13,619.53	152,201.49	40,661.33	192,862.82	17.45	401,534.36	208,671.54
K. C. S.	165,821.02	15,669.35	150,151.67	40,661.32	190,812.99	2.24	51,543.67	Cr.139,269.32
M.-K.-T.	165,821.02	15,501.06	150,319.96	40,661.32	190,981.28	4.12	94,803.53	Cr. 96,177.75
Mo. Pac.	165,821.02	13,415.24.	152,405.78	40,661.32	193,067.10	16.77	385,887.17	192,820.07
St. L.-S. F.	165,821.01	15,227.78	150,593.23	40,661.32	191,254.55	3.86	88,820.78	Cr.102,433.77
Un. Pac.	165,821.01	15,129.35	150,691.66	40,661.34	191,353.00	6.60	151,869.73	Cr. 39,483.27
Wab.	165,821.01	15,376.69	150,444.32	40,661.35	191,105.67	4.10	94,343.32	Cr. 96,762.35
Total	$1,989,852.22	$176,731.67	$1,813,120.55	$487,935.95	$2,301,056.50	100.00	$2,301,056.50	

[fol. 85] EXHIBIT 3 TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 15682

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY

Intervening Petition of Chicago Great Western Railroad Company

Now comes Chicago Great Western Railroad Company, a corporation, and respectfully represents that it has an interest in the matters in the litigation in the above entitled proceeding, and moves that it may be allowed to intervene in and become a party to said proceeding, and for cause of intervention says:

(1) Petitioner, Chicago Great Western Railroad Company, is a corporation organized under and by virtue of the laws of the State of Illinois, and is a common carrier of freight and passengers by railroad in interstate commerce, and as such, is subject to the provisions of the Act to Regulate Commerce and Acts amendatory thereof and supplementary thereto.

(2) Petitioner is a party to the agreement, dated January 24, 1910, supplemental to the operating agreement dated June 12, 1909, and referred to in the original petition and answer filed herein. Under and by virtue of said agreement, petitioner is a user of certain of the facilities of defendant herein and has paid in the past and is now paying to defendant the amounts representing petitioner's proportion of the cost of operation, taxes, insurance, interest and other charges of defendant. There is attached hereto and made a part hereof, marked Exhibit 1, a statement of the percentage of use of the facilities of defendant made by the parties to said operating agreements as compared with the percentage of total operating expense and total fixed charges required to be paid by each of such lines, including your petitioner, under the terms of the operating agreements dated June 12, 1909, and January 24, 1910, and referred to in the complaint and answer filed herein.

[fol. 86] (3) In the answer filed herein by defendant the jurisdiction of this Commission in this proceeding is questioned and the right of this Commission to grant such an order as is prayed for by complainant is denied. If, notwithstanding this, this Commission does take jurisdiction of the controversy and does grant to complainant the right to use the facilities of defendant upon the payment of any sum or sums less than those which it would be required to pay under the terms of said operating agreements, there will result a discrimination against your petitioner, in that complainant will have the same rights in the Kansas City Terminal as your petitioner, but will secure such rights upon the payment of a less sum relatively than your petitioner will be required to pay. Any order so entered by this Commission granting complainant the right to use such facilities of defendant upon the payment of any sum or sums less than those which it would be required to pay under said operating agreements, will also result in an increase in the amounts which your petitioner will thereafter be required to pay under the terms and conditions of said operating agreements. Your petitioner further says, that if complainant is granted the right to use the facilities of defendant, the compensation therefor to be fixed by this Commission in any amount less than the amounts which complainant would be required to pay under said operating agreements, then that your petitioner is entitled to the same right and that any order entered herein granting said right to complainant, should also grant similar relief to your petitioner.

Wherefore, said Chicago Great Western Railroad Company, prays leave to intervene and be treated a party hereto with the right to have notice and appear at the taking of testimony, produce and cross-examine witnesses and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at Chicago, this 14th day of May, A. D. 1924.

Chicago Great Western Railroad Company, by Ralph M. Shaw, Frank H. Towner, Its Counsel.

[fol. 87] EXHIBIT 4 TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 15682

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY

Petition for Leave to Intervene of the Kansas City Southern Railway Company

Comes now The Kansas City Southern Railway Company, herein called the Intervener, and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding and desires to intervene and become a party to said proceeding, and for grounds of the proposed intervention says:

Your Intervener is a Missouri corporation existing under and by virtue of the laws of the State of Missouri, with its principal office, and northern terminus, at Kansas City, Missouri. It is a common carrier engaged in the transportation of passengers and property wholly by railroad between points in the states of Missouri, Kansas, Arkansas, Oklahoma, and Louisiana, and, in connection with its affiliated company, the Texarkana and Fort Smith Railway Company, through passenger and freight trains are operated to Port Arthur, Texas, on the Gulf of Mexico. As such common carrier Intervener is subject to the provisions of the Interstate Commerce Act.

By the application of Missouri-Kansas-Texas Railroad Company filed herein it invokes the jurisdiction of this Commission and seeks affirmative relief under the provisions of paragraph 4 of Section III of the Interstate Commerce Act, as amended by the Transportation Act, 1920. The answer filed by Kansas City Terminal Railway Company to the application aforesaid challenges the jurisdiction of the Commission to grant the relief prayed or any relief under said application either under said paragraph 4, Section III of the Interstate Commerce Act, or otherwise, upon the numerous grounds stated in said answer. If the

[fol. 88] issues thus joined are resolved by the Commission in favor of its jurisdiction, and if the Commission assumes jurisdiction to act in the premises and grants the relief prayed or other relief to said Missouri-Kansas-Texas Railroad Company, Intervener states that it is entitled to relief in respect of its relations to the use by Intervener, and the burdens attending such use, of the terminal facilities of said Kansas City Terminal Railway Company upon the facts hereinafter stated.

Your Intervener has been and is now using the Union Passenger Station and certain portions of the passenger and freight terminal facilities of the Kansas City Terminal Railway Company, herein called the Terminal Company, at Kansas City, Missouri, described in the petition of the Missouri-Kansas-Texas Railway Company, herein called the Petitioner, and is making payment to said Terminal Company therefor in accordance with the terms of the contract between the Terminal Company and the proprietary companies (of which your Intervener is one) dated June 12, 1209, known by the parties thereto as the Operating Agreement, and the contract supplemental thereto, dated January 24, 1910, which said contracts are mentioned and referred to in the petition of said Petitioner.

Your Intervener says that prior to its becoming a party to said Operating Agreement it had, at large expense, constructed a Union Station at Second and Wyandotte Streets upon its own lines in Kansas City, Missouri, which station was amply sufficient for the use of your Intervener and of certain tenant railroad companies. Your Intervener's station was within four blocks of the City Hall in Kansas City, Missouri, and as close to the business center of Kansas City, Missouri, as the present Union Station of the Kansas City Terminal Railway Company. One street car line ran directly to it; another street car line ran within two blocks of it; and other lines were within three or four blocks of it. Although there was no practical necessity therefor, your Intervener discontinued the use of said station and entered into said Operating Agreement with the Kansas City Terminal Railway Company because of the public demand that all of the railways of Kansas City should use one Union Station.

[fol. 89] The proportions in which the proprietary companies, and the M-K-T Railroad Company, used the facili-

ties of the Kansas City Terminal Railway Company, during the year ended December 31, 1923, together with the amounts borne by each company, of the expenditures of the Terminal Company, are shown on a statement attached and made a part hereof, marked Exhibit "A".

The percentage of use of all the facilities of the Terminal Company, and the percentage of fixed charges of the Terminal Company, borne by each of the said tenants, as shown by the said Exhibit A, are, for the year 1923, as follows:

	Percentage of use of passenger station facilities	Percentage of use of all facilities of Terminal Co.	Percentage of fixed charges borne by each company
A. T. & S. F.	29.60	26.06	8.58
C. & A.	4.26	6.37	8.33
C. B. & Q.	10.19	10.49	8.36
C. G. W.	1.79	1.56	8.24
C. M. & St. P.	2.29	2.72	8.25
C. R. I. & P.	13.84	15.13	8.44
K. C. S.	2.10	2.22	8.24
M-K-T.	3.49	4.34	8.27
Mo. Pac.	16.36	16.37	8.44
St. L.-S. F.	6.88	5.15	8.28
Union Pac.	5.09	5.47	8.30
Wabash	4.11	4.12	8.27

(The percentages shown in the first column are taken from the Annual Report of the Kansas City Terminal Railway Company for the year 1923, and the percentages shown in the other columns are taken from the said Exhibit "A".)

As will be noted, while your Intervener's use of all the facilities of the Terminal Company, during the year 1923, averaged 2.22 per cent, the proportion of the fixed charges of the Terminal Company which was borne by your Intervener was 8.24 per cent.

Intervener's proportion (the figures which follow are taken from Exhibit "A"), on the basis of use, of the net fixed charges of the Terminal Company, that is, 2.22 per cent of $2,207,018.35, is $48,995.81, whereas the proportion actually borne by Intervener was $181,884.70.

Intervener's proportion, on the basis of use, of the net total of fixed charges and operating expenses of the Terminal Company, 2.22 per cent of $4,784,062.47 is $106,206.19, whereas the amount actually borne by it was $239,050.25.

[fol. 90] Your Intervener further says that its revenue from passengers into and out of the Union Station at Kansas City, Missouri, for the year 1923 was as follows: outbound $351,485.13; inbound $433,538.58; total $785,023.71. Your intervener's ratio of operating expenses to passenger revenue for the year 1923, computed on formulæ approved by this Commission, was 87.68 per cent. Applying this ratio to your Intervener's passenger business into and out of the Union Station at Kansas City, Missouri, your Intervener's net revenue from such passenger business would be $96,714.93. Yet, as stated above your Intervener's proportion of the fixed charges of the Terminal Company is $181,884.70, and its proportion of all charges is $239,050.25, amounts far in excess of its entire net revenue from the passenger traffic accommodated by the said station, and the passenger facilities of the Terminal Company are the facilities of that Company chiefly used by Intervener, since it has extensive freight terminals, and connections, of its own.

Intervener states that the above amounts are out of proportion to the use enjoyed by it of the said facilities, and constitute a heavy and undue burden upon its traffic.

Intervener further says that the figures for the year 1923 as typical of the situation for other years. As is shown by the said Exhibit "A", in the case of other small users, there is equal or greater disproportion between their use of the said facilities and the amounts borne by them.

On the other hand, as is shown by the said Exhibit, some of the companies require and enjoy a much larger proportion of the use of the Terminal Company's facilities, and bear a much smaller relative proportion of the expenses of the Terminal Company.

The cost of the facilities of the Terminal Company has been much greater than was estimated at the time when the contracts, above referred to, were entered into. The result has been that the amount of taxes, assessments and interest, which, under the above contracts, are borne in the proportion of one-twelfth, each, by the twelve com-

panies, is substantially greater than was anticipated, and has made the amounts borne by the small users entirely disproportionate to, and much greater than, the proportions of their use of the facilities. The burden upon the [fol. 91] relatively small users of the property, of which the Intervener is one, has been much greater than was anticipated by them, and the expense constitutes a heavy drain upon their revenues.

Efforts have been made by the proprietary companies to agree upon an adjustment between themselves which would distribute the expenses of this Terminal Company upon the basis of the use of those facilities by each company, or some other equitable basis, but, although the great majority of the said companies, including some of the large users, have been willing to make an adjustment, it has been impossible to secure unanimous consent thereto.

The development of the facilities of the Terminal Company, and the fulfillment of its franchise obligations, are embarrassed and delayed by this disagreement as to an adjustment of the proportions in which the expenses of the Terminal Company shall be borne.

On account of this failure to reach such an adjustment, the M-K-T Railway Company, which purchased, at foreclosure, the property of the M. K. & T. Railway Company, has withdrawn from, or refused to adopt, the said contracts, and the courts have held that the said agreements are not binding upon it.

The granting, however, of the petition of the M-K-T Company, upon the terms asked by it in the said application, without making an adjustment as to the other companies, will not only not settle the matter, but will aggravate it.

The said operating agreement between the Kansas City Terminal Railway Company and the proprietary lines, of which Intervener is one, provides in sub-paragraph (f) of Section 1 of Article 2 as follows:

"In case any of the Railway Companies shall make default in the payment of any sum which under the provisions of this section shall be payable by such Railway Company, then the sum which such Railway Company in default failed to pay shall be apportioned equally among the other Railway Companies or the one of them not in default, and each of such other Railway Companies, or the

one (as the case may be), shall pay a ratable (or the whole) share of such sum forthwith upon demand of the Terminal Company, or, if the Terminal Company be in default, as [fol. 92] hereinafter specified, under its said First Mortgage, then upon demand of the Trustee Company."

If, therefore, the Missouri-Kansas-Texas Railway Company, and, it may be added, the Chicago & Alton Railroad Company, which is now in the hands of a Receiver, are permitted to use these terminals upon a user basis, without changing the existing arrangement as to the other companies, the extremely heavy burdens now resting upon the Intervener, and other small users, will be largely increased, and there will be a still greater discrepancy between the proportions paid by them, for the use of the facilities, and the proportions in which they use the said facilities.

In fact, it is not unlikely that the burden may become greater than some of the others of said small users are able to bear.

If the said Operating Agreement is unjust, inequitable and burdensome to the Petitioner, as charged by it, and as the Intervener believes it to be, it is equally or more ununjust, inequitable and burdensome to your Intervener, and to others of the small users of the said facilities, and the granting, only to petitioner, of the relief prayed for by it, will make said agreement still more unjust, inequitable and burdensome to Intervener, and said other small users, since the latter will have to bear their proportions of the alleged unjust, inequitable and burdensome charges which will thereby be saved by said Petitioner.

Intervener further alleges that the said Operating Agreement, as to Intervener and other small users, is discriminatory and contrary to the public interest, in violation of the Interstate Commerce Act and especially Section 3 thereof, and that if the relief prayed for by the M-K-T Railway Company is granted, it will become even more discriminatory and contrary to the public interest, as to the said small users.

Your Intervener, therefore, prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argu-

ment is granted, and if the Commission resolves the issue of jurisdiction presented by the application of Petitioner and the answer of the Terminal Company in favor of such [fol. 93] jurisdiction and assumes jurisdiction in the premmises, that the Commission enter upon an investigation of the entire situation and enter such an order herein as will fairly, reasonably and without discrimination place the use and the terms thereof of the terminal facilities of the Terminal Company by the various parties enjoying such use on a fair, just and equitable basis among such parties, in accordance with and in proportion to the use thereof made by the various parties.

Dated at Kansas City, Missouri, this — day of May, 1924.

The Kansas City Southern Railway Company, Kansas City Southern Building, 11th & Wyandotte Streets, Kansas City, Missouri, by —— ——, Its ——. —— ——, 306 Kansas City Southern Building, Kansas City, Missouri, Attorneys for Intervener.

[fol. 94] EXHIBIT 5 TO PETITION

10842

INTERSTATE COMMERCE COMMISSION

No. 15682

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

v.

KANSAS CITY TERMINAL RAILWAY COMPANY

Submitted July 10, 1925. Decided November 10, 1925

Upon petition by Missouri-Kansas-Texas Railroad Company seeking the entry of an order, pursuant to section 3 (4) of the interstate commerce act, according petitioner the right to use, upon compensation determinable wholly upon a user basis, designated portions of the union passenger and freight terminals at Kansas City, Mo.-Kan., owned and operated by respondent Kansas City Terminal

Railway Company, and upon intervening petitions by certain so-called small-user proprietary lines seeking similar relief as to terms, Found:

1. The intervening small users, parties to the operating agreement governing the use and operation of the terminals and entitled thereunder and as proprietaries to use thereof, are not within the contemplation of section 3 (4) of the act, and as to them this commission is not thereby or otherwise empowered to grant the relief sought. Contract division of interest and taxes not shown to be unduly prejudicial or preferential or unjustly discriminatory. Intervening petitions dismissed.

2. If, in a cause now pending in the Federal courts, the Missouri-Kansas-Texas Railroad Company shall be finally adjudged to be bound by the operating agreement, relief can not be granted; if adjudged not to be so bound, further proceedings may be had looking to the entry of an order according petitioner a right of user, and thereupon, if the parties can not agree, a determination of the terms thereof and the compensation to be paid or secured therefor, in accordance with the provisions of the act.

Joseph M. Bryson and C. S. Burg for petitioner.

Samuel W. Sawyer and Richard S. Righter for respondent.

T. J. Norton for Atchison, Topeka & Santa Fe Railway Company; Bruce Scott, Walter McFarland, and Kenneth F. Burgess for Chicago, Burlington & Quincy Railroad Company; Wallace T. Hughes and W. F. Dickinson for Chicago, Rock Island & Pacific Railway Company; Edward J. White and Thomas Hackney for Missouri Pacific Railroad Company; H. A. Scandrett, N. H. Loomis, and C. B. Matthai for Union Pacific Railroad Company; Silas H. Strawn, Ralph M. Shaw, and Frank H. Towner for Chicago & Alton Railroad Company and receivers and Chicago Great Western Railroad Company; Frank H. Moore and A. F. Smith for Kansas City Southern Railway Company; [fol. 95] E. T. Miller and M. G. Roberts for St. Louis-San Francisco Railway Company; J. N. Davis for Chicago, Milwaukee & St. Paul Railway Company; and N. S. Brown and L. H. Strasser for Wabash Railway Company, interveners.

Report of the Commission

McManamy, Commissioner:

Exceptions to the report proposed by the examiner, and replies to certain of the exceptions, have been filed by various parties, and the issues have been argued on briefs and orally. With some amendments of his grounds therefor, we reach the conclusions proposed.

The proceeding arises upon a petition by the Missouri-Kansas-Texas Railroad Company, which seeks the entry of an order by us, pursuant to the provisions of section 3, paragraph (4), of the interstate commerce act, according petitioner the right to use, upon equitable terms, designated portions of the union passenger and freight terminals at Kansas City, Mo.-Kans., owned and operated by the respondent Kansas City Terminal Railway Company. In the petition, filed March 10, 1924, it is alleged, in substance and with a conceded correction, that the terms imposed upon petitioner for its present use of the terminals are unjust, inequitable, and burdensome in that, under the operating agreement hereinafter more fully outlined and agreeably with which petitioner's present use is enjoyed, each of the proprietary lines parties thereto is required to pay one-twelfth of the interest on respondent's bonded indebtedness and one-twelfth of the taxes payable by respondent, without regard to the use of the terminals made by each proprietary company. It is further alleged that the petitioner, which purchased at judicial sale most of the railway lines of the former Missouri, Kansas & Texas Railway Company and the line of the Wichita Falls & Northwestern Railway Company, is a small user of the terminal facilities, and that its payments for interest and taxes are out of proportion to its use; wherefore petitioner has elected not to become one of the proprietaries of the respondent company or to adopt the operating agreement to which the first named of its predecessors was a party, and has given respondent appropriate notice thereof. The prayer for permanent relief is that we shall prescribe, upon a user basis, the terms upon which petitioner shall have the right henceforth to use portions of the terminals, including main-line tracks, lying within certain zones designated by numbers and hereinafter more fully described.

Pending final disposition, and by service order No. 40, entered March 27, 1924, pursuant to section 1, paragraph (15), of the act, upon a further prayer of the petitioner and [fol. 96] for cause shown, we ordered that, effective April 1, 1924, and until our further order, respondent permit petitioner to use the said terminals, including main-line tracks for a reasonable distance outside, lying within the specified zones, upon the terms and provisions of the said operating agreement and for the compensation therein provided; payments in accordance therewith, however, not to be the final measure of compensation for use during the period the service order shall be in effect, the total compensation ultimately to be paid for that period to be upon such terms as the carriers may agree, or, failing such agreement, as we may, after subsequent hearing, find to be just and reasonable.

In due course respondent filed a plea to our jurisdiction in the premises and a motion to dismiss the petition, together with an answer on the merits.

In respect of the prayer for the service order the grounds set up in support of the plea and motion are (a) that there is no emergency within the meaning of section 1 (15) of the act, since petitioner has had the right to use the terminal facilities by adopting the operating agreement to which its predecessor was a party, and the condition which impels petitioner to ask for the order is the result, not of an emergency existing in any part of the country within the contemplation of the section cited, but of petitioner's voluntary act and unreasonable delay; (b) that the section in question, if interpreted to admit of or to require such an order in this case, deprives respondent of its property without due process of law, in violation of the fifth amendment to the Constitution of the United States, and of the right of trial by jury, in violation of the seventh amendment to the Constitution; (c) that section 1 (15) is violative of the fifth and seventh amendments in that it provides for an ascertainment of compensation by this commission, without provision for a judicial ascertainment of such compensation and for trial by jury of the amount of compensation to which the railroad company affected may be entitled; and (d) that the section in question applies only to trunk-line railroads, and does not authorize an order empowering a railroad company to use the station and terminal facilities

of a terminal company organized and maintained as a joint facility.

In respect of the permanent relief sought by petitioner, the grounds set up in support of the plea to the jurisdiction and the motion to dismiss are:

(a) That section 3 (4) of the act does not authorize us to require a terminal company owning a station and terminal facilities, constituting itself a joint facility, to permit the use of its facilities by the successor of a proprietary company, or the purchaser at foreclosure sale of such proprietary company's property, unless such successor or pur- [fol. 97] chaser shall agree to adopt and be bound by the contracts and terms which bound its predecessor;

(b) That the said section of the act, if interpreted to authorize us to require the use of respondent's facilities by petitioner, is unconstitutional and void and in violation of the fifth and seventh amendments to the Constitution;

(c) That we have no power or jurisdiction to disturb, change, or affect existing contract relations between petitioner and respondent and no power to permit petitioner or any other railroad company to use respondent's terminal facilities upon terms constituting a discrimination against the other users of the facilities;

(d) That there is now pending in the United States Circuit Court of Appeals for the Eighth Circuit a certain cause in which is involved a question of the fairness, as to respondent, of the offer made to creditors by the reorganization managers who caused the organization of the petitioner, as a result of which, if the decision be favorable to respondent, the petitioner will be absolutely bound by the provisions of the aforesaid operating agreement, and that we have no power to make any order in the premises which would change the relations between the parties as so determined, or any order in the matter whatsoever pending the determination of the cause in the said court;

(e) That section 3 (4) applies to trunk-line railroads only and does not authorize an order for the use by a railroad company of the station and terminal facilities of a terminal company or an order prescribing compensation for such use.

Petitions in intervention were severally filed by the 11 remaining proprietary lines, namely, Atchison, Topeka & Santa Fe Railway Company, hereinafter called Santa Fe; Chicago, Burlington & Quincy Railroad Company, hereinafter called Burlington; Chicago, Rock Island & Pacific Railway Company, hereinafter called Rock Island; Missouri Pacific Railroad Company, hereinafter called Missouri Pacific; Union Pacific Railroad Company, hereinafter called Union Pacific; Chicago & Alton Railroad Company and its receivers, hereinafter called Alton; Chicago Great Western Railroad Company, hereinafter called Great Western; Kansas City Southern Railway Company, hereinafter called Kansas City Southern; St. Louis-San Francisco Railway Company, hereinafter called Frisco; Chicago, Milwaukee & St. Paul Railway Company, hereinafter called Milwaukee; and Wabash Railway Company, hereinafter called Wabash.

The Santa Fe, Burlington, Rock Island, Missouri Pacific, and Union Pacific, more or less generally referred to of record as the large users of the terminals, intervened in [fol. 98] opposition to the relief sought by petitioner. The others, likewise referred to as the small users, intervened to obtain the same relief as to terms that petitioner seeks, and incidentally urge that to grant such relief to petitioner alone would only aggravate the present situation and unlawfully discriminate against the other users of the terminals. The Santa Fe also filed a motion to dismiss the initiatory petition, upon the grounds (a) that it seeks the reformation of a contract, which is within the exclusive province of a court of equity; (b) that to assume to grant the relief sought would cast upon that intervener and others having proprietary interests a financial burden wholly different from that contemplated in the execution of the operating agreement; and (c) that such action would be in direct conflict with the ordinances of Kansas City, Mo., enacted in aid of the creation of the terminal facilities and for the financial protection of the proprietary companies which undertook the task of providing adequate facilities for the public.

Respondent filed motions to strike the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, and Milwaukee, upon the grounds (a) that the said petitions unduly broaden the issues raised by the initiatory petition and the answer thereto; (b) that in effect

the intervening petitions ask for the reformation of a contract, or for the modification or nullification thereof, and that we have no such power; (c) that neither section 3 (4) nor any other provision of the act empowers us to modify, supersede, nullify, or ignore existing contracts between carriers concerning the use of terminal facilities; (d) that if section 3 (4) or any other act of Congress may be interpreted to confer upon us any such power, it is unconstitutional and void and in violation of the fifth amendment to the Constitution; (e) that we have no power to reform contracts, such power being vested in courts of equity of the United States, subject to the well-recognized principles of law and equity applicable thereto; and (f) that an order granting the prayers of the interveners would operate to deprive respondent of its property without due process of law, in violation of the Constitution, would be beyond our jurisdiction and power, and is not authorized by section 3 (4) or by any other act of Congress.

While a like motion to strike the intervening petition of the Alton was not interposed, apparently because that petition did not ask for specific relief, the same objections would apply and have been made to the relief sought under it; a relief vigorously urged throughout the proceeding in the Alton's behalf and as vigorously opposed throughout by respondent and those interveners which make common cause with it. Beyond filing its intervening petition and entering an appearance, the Milwaukee has taken no active [fol. 99] part in the case. Although we entered orders granting leave to intervene, except as to the Union Pacific, which intervened at the hearing, further consideration of the plea to the jurisdiction and of the motions to dismiss and to strike was not foreclosed and was merely postponed to the consideration of the case on the merits.

A preliminary brief history of the union terminals will lay the foundation for a clearer understanding of the present controversy.

For some time prior to 1906 (disregarding here, for convenience, reorganizations except as indicated) the Santa Fe, Rock Island, Milwaukee, Burlington, Frisco, Union Pacific, Missouri Pacific, Alton, Wabash, and the former Missouri, Kansas & Texas Railway Company, the latter hereinafter called the old company, had used for their passenger trains the so-called old union depot at Kansas City, situated near the Missouri-Kansas boundary line, on the

Missouri side. The Kansas City Southern then occupied its own station, situated elsewhere, with the Great Western as a tenant. The union depot was inadequate, and there had been an active and growing public demand, and some agitation among the carriers themselves, for the construction of better facilities. Negotiations by the carriers to that end were accordingly begun, pertinent details of which and of other steps in the consummation and conduct of the project will be commented upon as occasion may suggest. Suffice it to say for the moment that the negotiations culminated as follows:

In 1906 the above-named 10 lines which used the old union depot caused to be organized the respondent corporation, under the laws of Missouri—originally with an authorized capitalization of $30,000,000, but increased to $50,000,000 the following year—as a common carrier by railroad, with appropriate powers, and at all times since subject to all appropriate provisions of the act. Of its authorized capital stock $1,000,000 was then subscribed and paid for in equal amounts by the promoting lines. Its directorate is composed of a representative of each of the proprietaries.

June 7, 1909, an ordinance was approved by the common council of Kansas City, Mo., which provided, in furtherance of the terminal project, for the vacation of certain streets and alleys in the city, the construction and maintenance by respondent of viaducts and subways over and under the existing and projected terminal tracks, and for other kindred matters, granted rights of way and franchise rights to respondent, provided for assignment to respondent of rights, franchises, privileges, and immunities outstanding in the Kansas City Belt Railway Company, etc. Among other details, it prescribed certain governing terms, including an observance of the operating agreement, to be entered into, in the use and operation of the new terminals [fol. 100] not only by respondent and the then proprietary lines but also by any line thereafter to be admitted. This ordinance, as amended August 19, 1911, in some minor respects, and embracing an effective period of 200 years, is the franchise ordinance before referred to; and sections 12 and 27 thereof, presently to be considered, bear directly upon the merits of this proceeding. The ordinance was submitted to the qualified voters of the city at an election

held for the purpose and ratified by them. Pursuant to its provisions, it was accepted in writing by respondent, and each proprietary line filed its written acceptance in the from prescribed by section 27, binding itself to observe the provisions thereof.

June 12, 1909, an agreement was entered into by and between respondent, the aforesaid 10 lines, and the Illinois Trust & Savings Bank as trustee, with mutual covenants relating to the construction, maintenance, use, operation, and management of the new union passenger station and other terminal facilities. This agreement was supplemented, January 24, 1910, by the inclusion of the Kansas City Southern and Great Western on equal terms with the original proprietary lines. The original and supplemental agreements comprise what is known and herein referred to as the operating agreement. Among its various provisions, the respondent grants to each proprietary line the right to operate its trains upon and over the unified passenger and frieght terminals for a period of 200 years.

Also on June 12, 1909, a stock-trust agreement was entered into between respondent, the then 10, later 12, proprietary lines, and the Pioneer Trust Company of Kansas City. It provided for transfer of the shares of respondent's capital stock owned by the proprietary lines, and of such further shares as should be offered to and subscribed for by those lines from time to time, to the trust company, in trust, for the purpose of carrying out the provisions of the operating agreement and as security for their performance, with provision against acquisitions of such stock by outside interests. The trustee is required, upon request, to furnish proxies to the proprietaries to enable them to vote at stockholders' meetings.

Respondent acquired the real estate necessary for the construction and unification of the passenger and freight terminals in accordance with the plans ultimately adopted, secured contracts for the acquisition of the captial stock of the Kanasa City Belt Railway Company and the former Union Depot Company, later acquired the physical properties of those companies, and took other steps essential or appropriate to the consummation of the project. Work was begun and prosecuted, with the result that the new union passenger station was opened for business November 1, 1914, and the joint-terminal facilities were made ready for use and operation as such.

[fol. 101] The terminal arrangement and the present zoning of the terminals are portrayed by the map or diagram which accompanies this report, reproduced from one of the exhibits of record. As will be observed, two portions of the terminal layout are shown upon enlarged scales and in greater detail in the inserts A and B at either side of the map. The points of the compass are not given, but, as indicated by the course of the Missour-Kansas boundary, the top of the map is north. The heart of the mercantile and office district is within the large loop and generally northward of the union station, the principal residential portions of the city lying southward of the station. An important, and perhaps the principal, industrial district, embracing packing plants, elevators, manufactories, etc., lies to the west, in the so-called West Bottoms, along the Kaw River, in the neighborhood of the State line.

The division of the unified terminal facilities into zones, numbered from 1 upward, as shown by the map, is made, as provided in the operating agreement, for the purposes of the necessary accounting between respondent and the lines which use different portions of the terminals, and is subject to such change from time to time as may be desirable or necessary. For present purposes the numbered zones afford convenient means of identification. At the hearing respondent's witnesses described the terminal construction, arrangement, and use in considerable detail, and some of the more general features of the layout may appropriately be referred to at this point.

Zone 6 embraces the union passenger station and appurtenant tracks, something over 18 in number. The station is used by all the carriers, at present including petitioner, and the operating agreement provides, as the franchise ordinance prescribed, that the station shall be so used for all inbound and outbound passenger trains, except suburban trains. Zone 5 is a four-track line extending northeastward from the McGee Street freight station and yards, adjoining the passenger station zone, to Sheffield, on the west bank of the Blue River, where connections are made with the Frisco, Missouri Pacific, and Milwaukee. Two tracks, zoned as shown on the map, extend thence across the river to connections with the Santa Fe and Kansas City Southern, and thence farther east to Rock Creek Junction, near the city limits, where connection is made with the Alton and

again with the Missouri Pacific. From the latter junction to the union station the distance approximates 6.5 miles; and between the connection with the Alton on the east and the State boundary on the west the line follows what form- [fol. 102] erly was the double-track of the Kansas City Belt Railway. Beginning at Rock Creek Junction and extending thence in a northwesterly and then a southwesterly direction, along the foot of the bluffs in that part of the city, to a track connection at the south end of the so-called Hannibal bridge, is what is known as the north-end freight line, in all about 6.5 miles in length. As the map discloses, it includes several zones. For most of the distance the line embraces two tracks, one used for part of the distance belonging to the Alton. Near the eastern extremity of the terminals the two principal lines are further united by the so-called Coburg connection, zone 32. The bridge tracks curving sharply to the southwest at the south end of the Hannibal bridge, embraced in zone 20, comprise the familiar Burlington gooseneck, over which respondent has trackage rights. The loop is completed by a double-track line, including the west-bluffs passenger line in zone 37, extending southwestward along the foot of the bluffs bordering the West Bottoms and the curving to the east to enter the union station. The old union depot stood at a point on what is now zone 19.

About a half mile to the southwest of the union station, within the area embraced in insert A, are the terminal coach yards and engine house and yards, with various appurtenant facilities, where the equipment of some of the lines is cleaned and otherwise, except as to heavy repairs, kept in condition for service. The Sante Fe, Milwaukee, and Frisco do not use the coach-yard facilities except in emergencies, and the Santa Fe, Burlington, Milwaukee, Frisco, and Union Pacific do not use the roundhouse and engine yard, but handle their equipment with their own facilities. As the map further shows, the terminals extend across the State line and the Kaw River into Kansas City, Kans., details of which appear in insert B. The river is crossed by the so-called high line, which, including the bridge and approaches, is a double-deck steel and concrete structure, with two tracks on each deck. The upper deck, which is zone 55, is used exclusively for passenger trains, and the lower deck, or zone 9, is used for freight. In the

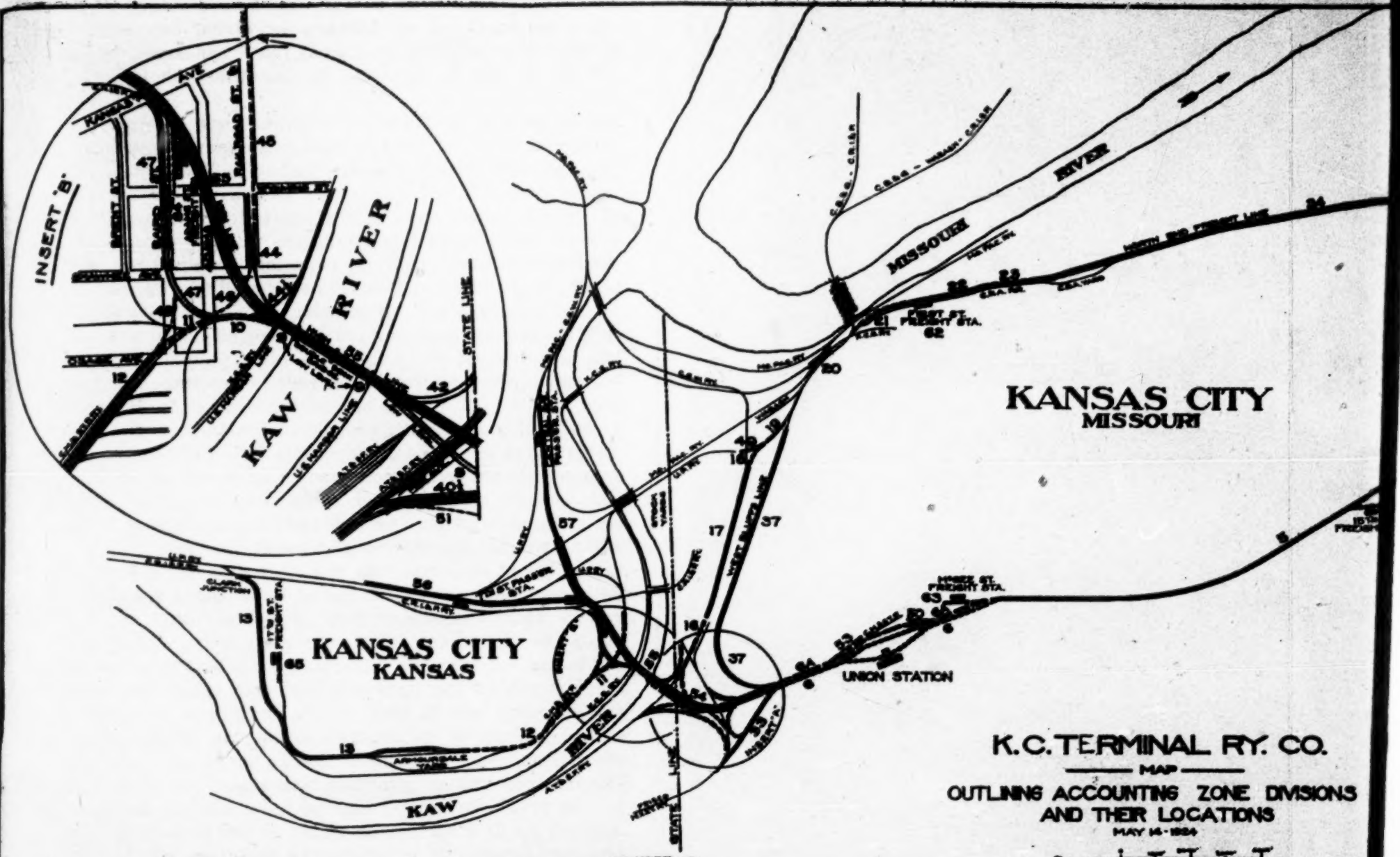
terminals as a whole respondent operates a total of 172 and a fraction miles of track, of which 148 and a fraction miles are owned by it, and reaches 208 industries with its rails. With its own motive power it performs switching services for the using lines and locally for industries. It also maintains and operates a number of freight stations and substations, through which traffic of the various carriers is handled. Some freight yards and team tracks are operated by respondent, and others are maintained and operated by the carriers. Respondent also maintains two passenger stations on the Kansas side, one used by the [fol. 103] Union Pacific and Rock Island and the other by the Missouri Pacific and Great Western and for all classes of passenger service.

The line over the Hannibal bridge and thence over the west-bluffs line to the union station is used by the Burlington, Wabash, and Rock Island. The Missouri Pacific, Union Pacific, Great Western, and Rock Island enter from the Kansas side by way of the high line. The Frisco has one line from the southwest, a short section of which, as it crosses the State line and connects with zone 33, is shown on the map. The Missouri Pacific, Alton, Santa Fe, Kansas City Southern, Rock Island, Milwaukee, and Frisco use zone 5 in the operation of their passenger trains. Santa Fe freight trains operate over that zone, using zone 6a past the union station. As indicated, some of the carriers use more than one route into or through the terminals. The north-end freight line is used exclusively for that service and principally by the Alton. All of the terminal main lines are available to all the carriers under reasonable regulations, and the facilities are joint in the fullest sense. While much more detail is covered in the record, such as points of interchange with the several carriers, zones respectively used, and other things, the foregoing outline is sufficient for present purposes.

Petitioner approaches Kansas City from the southwest, and operates from Paola, Kans., into the city, a distance of about 40 miles, over the line of the Frisco under a long-time trackage contract. It owns and maintains extensive freight yards and facilities at Rosedale, Kans., known as its Glen Park yards, about 1.25 miles distant from the union station, and a freight station in the West Bottoms east of the State line. The portions of the terminal facilities specified in its petition, the use of which it desires as a tenant

only and upon the terms indicated, are zones 5, 6, 6a, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 33, 33a, 34, 35, 36, 38, 39, 40, 40½, 41, 42, 43, 43½, 44, 44½, 45, 46, 47, 48, 49, 50, 53, 60, 61, 62, 63, 64, and 65.

As appears from what has been stated, the intervening so-called small users seek directly at our hands, and as far as terms are concerned the petitioner seeks the practical equivalent of, relief from the provisions of the operating agreement in so far as interest on respondent's bonded indebtedness and taxes payable by respondent are thereby apportioned among the using lines in equal parts, regardless of individual uses of the terminals by those lines. Respondent and the remaining interveners, on the other hand, rely upon the franchise ordinance and the operating agreement as interposing effectual barriers to any such relief. The provisions of those instruments thus drawn in question will therefore now be outlined.



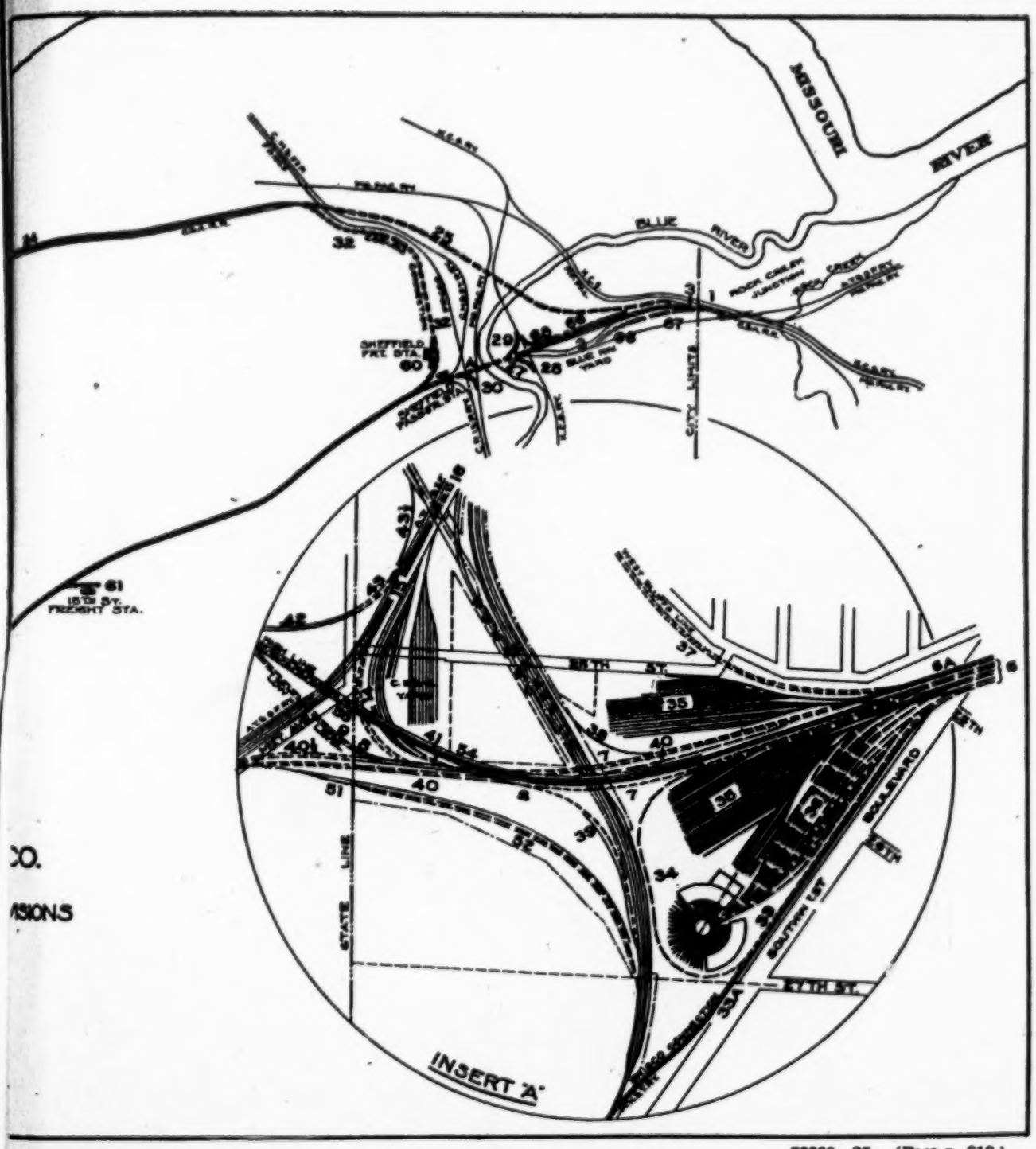
K.C. TERMINAL RY. CO.

MAP

OUTLINING ACCOUNTING ZONE DIVISIONS AND THEIR LOCATIONS

MAY 14 - 1924

Scale



73380—25. (Face p. 212.)

The pertinent conditions imposed upon the enjoyment of the rights and privileges granted by the franchise ordi-
[fol. 105] nance are, other than as to acceptance in writing by respondent, contained in sections 12 and 27 of the ordinance.

In substance, the conditions imposed by section 12 are that the union passenger station and the railroad tracks and other facilities affording entrance thereto shall be open to the use of all railway companies for their passenger trains, all, except suburban trains, to be operated into the union station; that no company shall be admitted to the station and facilities connected therewith until it shall have filed with the city its written consent to be bound by those provisions of section 27 relating to the operation of respondent's tracks as parts of the admitted company's line, upon the happening of the contingency set forth in that section, to the same extent that the constituent companies are bound, subject to the conditions of section 12; that the four main tracks authorized to be constructed upon the line of the Kansas City Belt Railway shall, so far as constructed, be open to the use of all railway companies for the passage of their freight trains drawn by their own engines and manned by their own crews; that any railway company acquiring, by contract, ownership, or through the courts, the right to use the union station and terminal facilities for its passenger trains shall be entitled to the same operating rights for both its freight and passenger trains as the constituent or proprietary companies, subject to reasonable and nondiscriminatory regulations; and that the use of the station and tracks and facilities shall not be available to any company organized at the date of the ordinance or thereafter to be organized, engaged or to engage, as the successor of any of the named proprietary companies, in the operation of the tracks and railways, or any part thereof then owned and operated by said proprietaries, or any of them, which shall fail or refuse to comply with all the conditions of the operating agreement to be entered into and filed with the city clerk. The section also makes provision for an application, by any carrier entitled to the use of the station, tracks, and facilities in connection therewith, or to the use of the aforesaid four main tracks for passage of its freight trains, to any court of competent jurisdiction in Jefferson County, Mo., or elsewhere if the parties consent, which court, if the parties are unable to agree re-

specting compensation, shall have power, subject to the right of appeal, to fix the fair and just compensation for such use and the terms and conditions under which the same may be enjoyed, further subject to the foregoing conditions and limitations.

Section 27 provides that in the event of a change, by any one or more of the constitutent carriers, in the long-existing practice of absorbing switching charges on competitive traffic and of applying equal rates to freight substations and main freight stations of the various carriers, then, [fol. 106] upon demand by the city, respondent shall convey to such carrier or carriers, for a nominal consideration and during the period it or they shall continue to be a constituent or constituents, the right to use for freight purposes for all such tracks as respondent owns or has the right to use, or shall in future own or have the right to use, to the full extent of such ownership or right, in such manner as to make the said freight tracks parts of the railroad of such constituent carrier or carriers to the same extent as though owned by it or them, and of any other carriers admitted to use the same, as tenants in common. It is further provided that upon such conveyance the grantee or grantees shall exercise their rights in common with each other and with respondent, and with any other company or companies thereafter admitted, and shall use the tracks as parts of their respective railroads, consistently with one another's use, as though each of the tracks constituted as to each such carrier an extension of its own tracks, and said tracks shall be in all respects and for all purposes, as between the city and any person, firm, or corporation shipping to or from the city, a part of the railroad of such carrier. Any carrier to which such conveyance shall be made which shall fail to accept the same and to take and operate the tracks as stipulated, or any carrier which shall cease to be a constituent, shall forfeit the right to use, and shall not be permitted to use, the union station or terminal or other facilities of respondent, or to enter upon any of the tracks or cross any of the streets or highways covered by the grant in said ordinance, or have the benefit of any of respondent's property. If, also, upon the happening of the contingency, respondent shall fail or refuse to make such conveyance within 90 days after notice from the city, it shall forfeit all its rights under the grant. Upon a restoration, after the contingency happens, of switching

absorptions by any such carrier and of equality of rates as between its main freight station and the freight substations, such conveyance may, after the lapse of one year, be canceled and the former status restored. Respondent's power to grant to any carrier the right to use the union station, tracks, and terminals "is limited so that such grant shall not authorize the grantee herein to violate any of the terms of the ordinance." Before any constituent company, or any other company under contract with respondent, shall be permitted to enter upon or have the right to use the union station, tracks, terminals, or other property it shall file with the city its written acceptance in the form prescribed in section 27, agreeing to comply with the provisions of the section.

The operating agreement, to which the franchise ordinance refers as above, is a mutual engagement between [fol. 107] respondent, the proprietary lines, and the trustee first above named. Its provisions cover construction, maintenance, operation, use, and management of the terminals, switching and other services to be rendered the proprietaries, and other appropriate matters. It can be modified in any respect only with the assent of respondent and each proprietary line, and only with the additional assent of the trustee in respect of the provisions governing payments of interest upon and principal of bonds, next mentioned, but provides for a ratable reduction of such payments upon admission of each additional carrier. The provisions with which we are here concerned govern the distribution of expenses among the using lines.

As it stands at present, with 12 signatory lines, including the old company, it provides that one-twelfth of the interest accruing on respondent's outstanding bonds and of the taxes and other governmental charges payable by respondent, and at maturity one-twelfth of the principal of the bonds, shall be assumed and paid over by each of the proprietaries. Maintenance and operating expenses, including overhead and other general outlays, on the other hand, are accounted for and assessed against each line, by zones used and by calendar months, in the proportion which its use bears to the total use by it and other lines of the respective zones. For the use of the union station and appurtenances, or zone 6, the latter expenses are apportioned, as to each line, in the ratio which the number of its loco-

motives and cars operated into and out of the station bears to the total number of locomotives and cars so operated by all the lines. In that accounting each locomotive is counted as two cars, the locomotive and cars in each train beginning or ending a journey at the station are counted once, and the locomotive and cars of each through train are counted twice, once upon entering and again upon leaving the station. Maintenance and operating expenses of the remaining zones are apportioned, by zones used, in the ratios which the mileage uses per car of the respective zones by the locomotives and cars of the individual carrier bear to the total mileage uses of the same zones made by all locomotives and cars, including those handled and operated by respondent, each locomotive being counted as two cars. The like expenses of respondent's freight stations and substations are divided in the proportions of the tonnage of the lines respectively served. Switching services are performed by respondent at tariff rates, and special services which it may render, such as care of equipment and the like, as well as such supplies as it may furnish, are made the subjects of special charges against the recipient lines, approximately at cost. Revenues derived by respondent from union station concessions or from other uses of the terminal facilities or property, or from switching [fol. 108] operations, after deductions of allocated expenses and charges, are credited monthly to the carriers not in default and in the respective proportions of their contributions as above.

Related provisions are that, while no termination or suspension of any rights of any constituent carrier shall limit or affect its obligation to make the payments provided for, which obligation is absolute and unconditional, without deduction for set-off or counter-claim or other excuse, during the full term of 200 years, yet if any such carrier shall default in payment of interest or principal the amount shall be apportioned equally among and paid by the carriers not in default, upon demand by respondent, or, if it be in default, by the trustee. If any such default in payment or in compliance with any other covenant or condition under the agreement shall continue for a period of 30 days after written demand by respondent for payment or compliance, respondent may elect to exclude the defaulting carrier from the use of the terminal facilities by giving written notice

of such election, without, however, releasing the carrier, but subject to the right of review of contested items; except that for a default in payment of interest or principal the exclusion shall, upon written request of any proprietary carrier not in default, be absolute. Provision is made for reinstatement of defaulting lines upon payment of arrears. Except when and to the extent required by law, respondent may not grant to any other railway company the right to use the terminal facilities unless at least two-thirds of the proprietary carriers not in default assent thereto in writing. By its concluding article the operating agreement is transferred and assigned to the trustee under respondent's first mortgage as further security for the bonds.

By way of support of the contention that the method of apportioning interest charges and taxes provided by the operating agreement is unjust and inequitable, tabulated comparisons of amounts paid by the several lines in accordance therewith and of amounts that would be payable if those charges were distributed on a user basis are exhibited of record. The comparisons are made on several bases, differing primarily in the relative proportions of use which are computed, depending upon the methods employed and their application to separate or aggregate zones, and differing accordingly in results. No particular purpose would be served by considering them in turn, as the conclusions reached make it unnecessary to determine which, if any, embodies an accurate or acceptable formula for division of the charges in question upon a user basis. Merely to illustrate the asserted differences between such charges apportioned in accordance with the operating agreement and again on a user basis the figures in the subjoined table are [fol. 109] excerpted from the first exhibit introduced in the case, stating accrued interest on all obligations, taxes, and special assessments, less profits from terminal operations, for the period from March 1, 1920, to December 31, 1923, and purporting to reapportion them in accordance with relative percentage uses of the entire terminal facility for that period:

Carriers	Percentages of use	Payments on user basis	Percentages assessed	Net actual payments	Increase or decrease on user basis
Santa Fe.....	26.96	$2,302,878.85	8.57	$732,379.63	[1] $1,570,499.22
Alton.....	6.50	555,219.30	8.33	711,830.71	[2] 156,611.41
Burlington....	10.03	856,746.10	8.37	714,905.01	[1] 141,841.09
Great Western.	1.91	163,149.05	8.23	703,407.37	[2] 540,258.32
Milwaukee....	2.89	246,859.04	8.25	704,450.10	[2] 457,591.06
Rock Island...	14.98	1,279,566.95	8.45	721,458.53	[1] 558,108.42
Kansas City Southern....	2.43	207,566.60	8.24	703,474.66	[2] 495,908.06
Petitioner.....	4.28	365,590.56	8.27	706,069.47	[2] 340,478.91
Missouri Pacific	15.57	1,329,963.78	8.45	721,749.65	[1] 608,214.13
Frisco.....	4.87	415,987.39	8.27	706,856.87	[2] 290,869.48
Union Pacific..	5.45	465,530.03	8.30	708,713.88	[2] 243,183.85
Wabash.....	4.13	352,777.80	8.27	706,539.57	[2] 353,761.77

[1] Increase.
[2] Decrease.

While the operating agreement provides for the assumption by each proprietary line of one-twelfth, or 8.33⅓ per cent, of the interest accruing on respondent's bonds, it appears that an issue of short-term notes was, upon the insistence of the small users, apportioned on a user basis, which would seem to account for the above slightly unequal percentage assessments and net payments actually made. Out of a total bond issue of $50,000,000 it appears that approximately $33,000,000 is outstanding in the hands of purchasers, and that approximately $17,000,000 is pledged as collateral to secure certain note issues. Whether the foregoing table may or may not fairly approximate the relative uses of the terminal facilities upon a proper method of determination, it is asserted on one side and not disputed on the other that a redistribution of the charges in question upon a user basis would materially reduce the assessments against some of the lines and materially increase them against others. The so-called large and small users bear correspondingly larger and smaller proportions of the considerable maintenance and operating expenses.

It would seem to be an admissible, although not conclusive, inference from the record that but for the greatly increased cost of the terminals over the original estimates the present controversy would not have arisen. No charge of bad faith or negligence is made, but some of the smaller users assert or imply that had the ultimate cost been foreseen they would not have joined in the project. It is pointed out that, as against a contemplated outlay in the neighborhood of $25,000,000 when the operating agreement [fol. 110] was signed and the project was definitely

launched, the ultimate cost practically doubled that figure and thus magnified the burden which, shared equally by large and small beneficiaries, has fallen upon the latter, with much still remaining to be done to complete the facilities to accord with provisions of the operating agreement and with the plans. The various estimates submitted from time to time are set out in the record with explanations of the increases, such as advanced prices of realty in the course of the prolonged negotiations, changes in the terminal plans, ultimate reduction of the grade of zone 5 from 1.5 per cent to 0.9 per cent, heavy burdens imposed by the city by way of costly viaducts and other grade separations, etc. Respondent and the interveners opposing the relief sought point out that at all times the small users have been in the majority on respondent's board of directors and therefore in position to control the adoption of plans and consequent expenditures. While the Great Western appears to have been invited to join in the project, the Kansas City Southern early and peremptorily demanded admission.

The negotiations of and among the proprietary lines and the advantages and disadvantages accruing to some of the smaller and some of the larger users, particularly in respect of the location of the union station, are dwelt upon at some length. It was first proposed to use the so-called packers' site, immediately north of the present north-end freight line and a short distance east of the Hannibal bridge. This plan fell through because the owners of the site demanded an exorbitant price. Had the station been located on that site, it is pointed out, the lines entering the city from the north would have made smaller uses of the terminal zones, with corresponding reductions in their assessments for maintenance and operating expenses, whereas the petitioner, for example, reaching the present station by a short haul over terminal tracks, would have been obliged to use the materially longer west-bluffs line and other intervening zones to reach a station on the packers' site. Particularly for the Santa Fe, the largest user, emphasis is laid upon the circumstance that it, the Milwaukee, and the Frisco, controlling and using the Kansas City Belt Railway, turned it over at a book value of $143.27 per share of capital stock, and thus contributed to the new project, at a nominal price of $3,500,000, a property claimed to be worth $9,000,000, made available to all the constituent lines and largely in consideration of the agreement by all to share

equally in interest and tax accruals. The Santa Fe also points out, as matters of which it might justly complain, that a low-level freight line on the north side, which would relieve its eastbound freight trains of the ascending grade of zone 5, requiring helper service, and terminal facilities for the care of its equipment, all contemplated by the oper- [fol. 111] ating agreement, have never been provided because of lack of funds. Many other incidents of and following the negotiations are embraced in the record, to review which would merely extend this report.

The grave concern with which the interested parties regard the present proceeding is evidenced by the fact that, among other witnesses, the presidents of eight of the interveners, the operating vice president of another, one of the receivers of the Alton, the operating vice president of the petitioner, and several of respondent's officials appeared and testified, for or in opposition to the relief sought, as their respective interests appeared. Petitioner's witness testified at length and introduced a number of exhibits. His evidence embraces in detail the uses of different zones by different lines, petitioner's contributions for interest and taxes under the operating agreement and upon user bases computed by different methods, a detailed estimate of the reduced cost of separately maintaining its own terminals upon its own property at Kansas City, and various incidental matters. The relief sought contemplates contributions on a user basis in respect of all items and as allocated to the particular zones to be used, without regard to relative uses of the terminals taken as a whole.

Of the interveners seeking relief, the Alton and Kansas City Southern press with particular vigor for a revision of the contract basis of dividing interest and taxes. The witness for the Alton denounced the operating agreement as the most disastrous contract into which that line had ever entered, and expressed his intention, in the event of a reorganization growing out of the pending receivership, of recommending to the court that it authorize a rejection of the agreement. While the Alton and other small-user interveners prefer to remain in the terminals if more favorable terms can be obtained, the witness believes that, if necessary, the Alton can withdraw therefrom and establish terminals on its own property with profit, notwithstanding probable losses of passenger business. The Kansas City Southern also urges that as to it a revision of the contract

terms is imperative, and its evidence is designed to show the severity of the burden imposed upon it by the operating agreement. Others of the small users consider the present terms inequitable and urge a division of the charges upon a user basis. Various other terminals are cited, in which similar charges are divided equally or on user bases. While the Union Pacific intervened in opposition here, it would favor an equitable revision by mutual consent of the parties in interest. Certain of the witnesses recount unavailing efforts to secure such a revision. The proposals [fol. 112] ranged from a distribution of interest and taxes wholly upon a user basis to an equal distribution of the interest upon $25,000,000 of the bonds, a figure approximating the originally estimated cost of the terminals, or upon the $33,000,000 of bonds in the hands of purchasers, the remainder to be apportioned according to use. The proposals are said to have failed through the opposition of the Santa Fe.

No less earnestly respondent and the opposing interveners protest against the proposed disruption of the contract basis of apportionment. It is insisted that such a step, if within our power to enforce, would have calamitous consequences, not only as to the terminal in question but also as to other projects of the kind, into which no carrier could enter and in which no capital could be invested with any faith in its future integrity. Added strength to these considerations is deemed to be found in the fact that in this instance the operating agreement has been assigned as further security for respondent's first-mortgage bonds. It is emphasized that the foundation security, the credit of the component lines, which makes terminal bonds attractive to investors, would be jeopardized or destroyed if once such readjustments were feared to be possible. Several investment bankers and the president of the trustee first hereinbefore mentioned, called as witnesses, strongly support the latter views.

With the foregoing summary we may turn to a consideration of the relief sought and of the contentions in support of and in opposition to that relief. It will be convenient to take up first the case of the intervening small users. Section 3 (4) of the act, relied upon in part by certain of them, and wholly by petitioner, as authorizing a grant of per-

manent relief of the kinds and upon the terms hereinbefore indicated, provides as follows:

> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or to other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to re- [fol. 113] cover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

This paragraph was added to section 3 by the transportation act, 1920, and superseded a limitation upon the requirement of the section that all common carriers subject to the act, afford all possible facilities for interchange of traffic between their lines, and for receiving, forwarding, and delivering passengers and property, without discrimination, that this should "not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Controverting respondent's challenge of our power or authority to grant any such relief, the interveners contend that we have power under existing law to relieve them of the obligations imposed by the operating agreement. The contention is not, however, founded upon an analysis of the

above-quoted paragraph; nor is any other provision pointed out as in terms conferring upon us any such power to revise a voluntary contract between carriers for the financial support of a joint terminal, not itself in violation of any provision of the act, as we are expressly given by section 15 (6) to revise divisions of joint rates, subjects of prior agreements between carriers, considered and sustained in New England Divisions Case, 261 U. S. 184. The contention rests in part upon judicial decisions recognizing the paramount authority of Congress in the regulation of interstate and foreign commerce, and in certain of them upholding direct exertions of its supreme authority or exercises of the authority committed to us as against existing contracts or conflicting exercises of a State's police power. Cited cases include Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, in which a contract, valid when made, whereby the carrier had obligated itself to provide two passengers injured on its railroad with annual passes for the remainder of their lives, was held to have been subject to an exertion by Congress at any time of its power to regulate interstate commerce and to have been invalidated by the act; Los Angeles Switching Case, 234 U. S. 294, which sustained an order by us requiring the carriers to cease and desist from exacting certain special charges for switching in interstate commerce, although, among other things, the shippers had theretofore consented to the exaction of the charges in consideration of performance of the service; and New York v. United States, 257 U. S. 591, in which was sustained an order by us which required, for removal of undue prejudice and preference, increases in intrastate fares and charges not only held by action of the State authority but in part fixed by an outstanding charter contract with one of the affected carriers. Another is Wisconsin R. R. Commission v. C., B. & Q. R. R. Co., 257 U. S. 563, which sus- [fol. 114] tained a like order as to intrastate fares held by State authority, and still others upheld various phases of the plenary regulatory power of Congress. It should be observed that in cases in which action on our part was considered and upheld, it was action pursuant to definite grants of authority.

The counter contention, that what is asked is the reformation of a contract, involving a power vested exclusively in courts of equity and exercisable only in cases of

fraud or mutual mistake, asserts a familiar principle of equity jurisprudence as applied to private contracts, of concern only to the parties thereto. Other considerations enter into a contract which is impressed with a public interest, whether a contract between carriers or between them and a State or municipality, the provisions of which encroach upon the latent or exerted authority of Congress under the commerce clause of the Constitution. The underlying principle considered, no such contract can be placed beyond the reach of a competent exercise of such authority merely by the inclusion therein or the relation thereto of outside interests not themselves subject to the act, however cautiously the power should be exercised in such cases. Nor does the fact that franchise grants are among the mutual covenants make it immune, as was settled in New York v. United States, supra, where in the interest of interstate commerce we had exercised a supervening authority expressly granted to us. In the present act the matter of regulation has been extended to embrace not only rates and practices of carriers subject thereto but also construction and abandonment of railroads, use of terminals, and many other subjects. It is of interest, in passing, that the franchise ordinance, upon which the operating agreement is in part founded, not only purports to prescribe terms governing the enjoyment of the Kansas City terminals by present and future users, but also the matter of switching absorptions and the application of line-haul rates to and from terminal points. Whether, then, Congress has or has not appropriately exerted its plenary power directly or through us is a question at the threshold of each case, and it remains here to consider whether the particular power invoked by the interveners has been conferred upon us.

The paragraph above quoted empowers us, when found to be in the public interest and practicable, without impairing the ability of a carrier "owning or entitled to the enjoyment of terminal facilities" to handle its own business, to require the use of the facilities by "another carrier" or "other carriers" upon terms and for compensation to be agreed upon or to be fixed as provided. The primary power to be exercised is to "require the use" of the terminals, which power the further power to fix the compensation in appropriate circumstances merely supplements. The re- [fol. 115] quirement is to be laid upon a carrier then "owning or entitled to the enjoyment" of the facilities and for

the benefit of "another carrier" or "other carriers"; in other words, to be laid upon a carrier owning or by lease or otherwise entitled to present enjoyment and for the benefit of a carrier or carriers not so owning or entitled.

Obviously, the interveners are not in the latter situation. They have been and are in all respects entitled to the past, present, and future enjoyment of the terminals in question, and have enjoyed and now enjoy them in their own right as virtual coproprietors. They and the other proprietary lines have the equitable title to the property and franchises in undivided equal shares, and through their corporate instrument, the respondent, the facilities are controlled and operated. Not only so, those interveners, equally with the other proprietaries, have been and still are parties to the operating agreement, and to accord them the desired relief would necessarily involve to that extent what would amount to a revision or reformation of that agreement. They do not seek an abrogation of the entire agreement as wholly invalid and not to be binding upon them in any part, but merely, however stated, that certain of its provisions be in effect rewritten. A contention by the Alton that it would not in terms require a revision of the agreement, but merely a revision of the charges now imposed upon that line, would seem to express a distinction without a difference. Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed. The power and authority thus invoked are not conferred by the quoted paragraph.

Certain of the interveners cite the provision of section 15a of the act, that we shall initiate, modify, establish, or adjust reasonable rates so that the carriers of the country, as a whole or by groups, will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of their railway property held for and used in the service of transportation. They contend that, giving effect to the policy reflected in that provision and without waiting until a carrier's bankruptcy shall ensue, we need only find as a fact that the operating agreement, improvidently entered into, is so burdensome to them as to result in inefficient

and uneconomical operation of their railways, to cause misapplication by them of funds created for an entirely different purpose, and generally to operate to impair their ability to furnish adequate railway service, and our jurisdiction for the purpose of the desired relief will at once attach. [fol. 116] However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. What the provision requires or authorizes us to do is to fix remunerative reasonable rates in circumstances which embrace honest, efficient, and economical management as a condition or limitation. We should have the information in that respect which will aid an effective exercise of our duty and authority, but we are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers. Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act.

Paragraphs (1) and (3) of section 3 are put forward as vitiating the operating agreement in so far as it provides for the equal division of interest and taxes. Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect whatsoever, chargeable to any common carrier or carriers subject to the act. Paragraph (3) commands the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding, and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation

for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

[fol. 117] An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee, and Alton.

In reaching the foregoing conclusions we nevertheless think that this case strongly suggests the advisability of a reexamination by the respective participating carriers of terminal arrangements which have been developed through past decades, including division of capital charges and adjustment of property interests. The subject is obviously of such importance to the public, including the railroads, that a reappraisal should be voluntarily undertaken in the light of present conditions.

A prefatory explanation of petitioner's status in the case is necessary to a consideration of its prayer for relief. The incidents leading up to and embraced in the reorganization proceedings through which the petitioner came into existence were many, but for present purposes the ensuing statement will suffice. Following a receivership, the properties of the predecessor old company were sold under foreclosure pursuant to a decree entered by the United States District Court for the Eastern District of Missouri, Eastern Division, in a suit in which respondent and others had intervened. The court declined to grant the prayer of those interveners that the final decree, when entered, should provide that upon sale of the properties the purchaser should take them subject to the operating agreement, and, on the contrary, provided by the decree that the purchaser might, within a year from date of delivery of deeds and taking possession of the properties, elect to adopt or reject any executory contract to which the old company was a

party; no mere conduct or user of rights within that period to conclude the purchaser in respect of such election. Upon appeal, Kansas City Terminal Ry. Co. v. Central Union Trust Company, 294 Fed. 32, the Circuit Court of Appeals for the Eighth Circuit sustained the court below, saying in part:

We * * * conclude that these contracts [original and supplemental operating agreements] are only of the nature of personal promises, and that they are not covenants running with and binding the properties in the hands of whomsoever they may come. * * * They are, it is true, contracts of the old company, * * * but they do not follow the property, and are not binding upon the purchasers, upon a foreclosure sale.

A petition for certiorari, upon which a further appellate review was sought, was denied by the Supreme Court of the United States. 264 U. S. 588. The cause having been remanded and in due course the properties having been sold, the district court entered a decree confirming the sale and directing delivery of deeds by the master, with the right in the purchaser to adopt or reject the operating agreement. [fol. 118] Within the time limited petitioner duly filed its election not to adopt the agreement. Respondent and others have prosecuted a further appeal, and have assigned as error the confirmation of the sale without requiring as a condition thereof that the purchaser assume the operating agreement. The Circuit Court of Appeals, in which the further appeal is still pending, has certified to the Supreme Court of the United States certain questions upon which it desires the instruction of that court, and a final determination may not be had for some time.

In pressing for the desired relief, petitioner contends that the question of its relation to the operating agreement is res adjudicata, while respondent contends to the contrary in the light of the pending further appeal. Petitioner's response that the appeal raises only questions of the fairness of the offer by the purchaser, as to creditors of the old company, is in turn countered by the contention that the matter of adopting or rejecting the agreement entered into the fairness of the offer as to respondent as an unsecured creditor. At all events, the question appears to be squarely raised on the further appeal. It is clear that

we should not undertake to usurp the office of the court and pass upon the merits of that appeal or upon the finality of the foreclosure decree in the particular thus controverted. The questions are before the same appellate court in the same cause, and the final determination can not well be anticipated. Except that meanwhile the petitioner will have had the temporary protection of our service order, a reversal of the court's former conclusion would appear to leave petitioner in the position of the intervening small users, before considered. However, the case has been heard and fully briefed, and the merits will be considered upon an assumption for the moment that petitioner is not bound by the operating agreement.

Respondent contends that petitioner, heretofore and now a terminal user in fact, is not "another carrier" within the purview of section 3 (4), and has been and is "entitled to" the use of the terminals at any time merely by adopting the operating agreement and accepting the pertinent provisions of the franchise ordinance, beyond the power of the other parties to deny. Assuming that the courts shall finally uphold the decree before mentioned, however, the contention recognizes that petitioner is not unqualifiedly so entitled, but only upon condition that it make certain concessions which are of the substance of this controversy. The present use is a provisional arrangement, covered by the service order, pending final determination of the controversy, and not by any arrangement with respondent or directly or indirectly by virtue of the franchise ordinance or the operating agreement. In its present position peti- [fol. 119] tioner is no more "entitled to" the use of the terminals. within the intent and meaning of the act, than any line would be at any terminal with which a satisfactory agreement as to terms could not be reached. It is for just such situations that the act was designed to provide a remedy.

Approaching the issue from another angle, respondent interprets section 3 (4) as requiring, not merely that we find petitioner's "use" of the terminals to be in the public interest, but that he must find it to be in the public interest that we should exercise the extraordinary powers conferred by the provision. Otherwise stating the interpretation, a public interest demanding that we "require the use" rather than one demanding the "use" is the condi-

tion precedent; and respondent urges that no such interest demands the requirement in this case, inasmuch as the desired use is available upon acceptance of the ordinance and agreement. Granting that it is primarily to obtain a requiring order that resort to the provision is had, it manifestly is the "use" which is the direct object and purpose of such a requirement with which the public interest is concerned. Petitioner, deeming the contract terms to be inequitable and excessive, has availed itself of its right to invoke our aid under the provision; and to concede respondent's conclusion here would mean that we should deny the benefits of the provision in every case in which the use would be available on some terms, regardless of any question of their acceptability.

It also is contended that to admit petitioner to the terminals upon terms other than those provided by the operating agreement and applicable to the proprietary lines would constitute an undue preference of petitioner and undue prejudice to the proprietaries or an unlawful discrimination against the latter. This apparently assumes, what ultimately might be found to be or not to be the fact (and what respondent believes would not be the fact), that the terms to be accorded would be more favorable than the contract terms. Be that as it may, what would be true of a single owner of the terminals would be true of virtually joint owners, including a subsidiary terminal company, and as between the mutual terms upon which the proprietary joint use is had and other terms accorded an outside line, as distinguished from discriminating terms accorded two or more outside lines, there would be no ground for a predication of undue prejudice and preference or unjust discrimination within the meaning of the act. See Louisville & Nashville R. R. v. United States, 242 U. S. 60.

One of the opposing interveners points out that the decree of the court merely authorizes petitioner's avoidance of the obligations of the operating agreement, and includes no determination respecting the validity or effect [fol. 120] of the franchise ordinance. It is understood, of course, that the court did not undertake to define the obligations which petitioner must or need not assume if it should desire to reenter the terminals, either in respect of the franchise ordinance or of the operating agreement.

Its decree, as it stands, merely relieves petitioner of a compulsory assumption of the status of a party to the agreement. The question now arises upon this record, whether petitioner's future use and enjoyment of the terminal facilities, if had, are unavoidably conditioned upon its acceptance and observance of the provisions of the ordinance and the agreement, or whether we may accord it as a tenant a right of user upon other terms. For answer, we refer to our foregoing discussion of the force and effect of such contract or franchise provisions as encroach, and to the extent that they encroach, upon the regulatory power of Congress, and repeat that Congress has now made the matter of terminal use, and of the terms and conditions of use, a specific subject of regulation in the manner provided by the act.

The objection raised in the plea to our jurisdiction and in the motion to dismiss that sections 1 (15) and 3 (4) apply to trunk-line railroads only and do not comprehend the facilities of a terminal company, has not been discussed on briefs or orally and may have been abandoned. In any event, it is difficult to conceive upon what reasoning the objection could be supported. Certainly, respondent is a carrier owning or entitled to the enjoyment of the terminals in question, and it and each of the proprietary lines is a common carrier subject to the act. While the provision of section 3 (4) relating to "main-line track or tracks for a reasonable distance outside" a terminal might possibly suggest that in framing it Congress had in mind, as the more common situation, trunk lines as terminal owners, yet Congress could hardly have been unaware of the practice of creating and operating joint terminals through subsidiary terminal companies. At least, the provision is not limited to trunk-line terminals; nor is the authorized relief limited in any case to a terminal use in connection with an outside main-line use, which latter a petitioner might not desire or be in position to make.

At this stage of the proceeding it is unnecessary to consider any question concerning the practical application of the provision of section 3 (4) that compensation to be paid by an outside line for a prescribed use of a terminal, if not agreed upon by the parties and if left for determination by us, is "to be ascertained on the principle controlling compensation in condemnation proceedings." We therefore

pass for the present a contention that a right to use the terminals may not lawfully be accorded petitioner upon compensation determinable upon the user basis desired by [fol. 121] it, but only in pursuance of principles of determination laid down in authorities cited. The section provides for an order requiring the use on such terms and for such compensation as the carriers affected may agree upon, subject to further recourse to us in the event the carriers fail to agree. If such an order shall be entered in this case and the parties shall thereupon be unable to agree respecting terms and compensation the appropriate measure can be determined by us if and when the case is reopened upon that question.

On original briefs and on exceptions respondent and the allied interveners insist that the terminal facilities constitute a unified and integral whole, not divisible or separable for the purposes of this proceeding, the use of no part of which can be separately condemned, and that section 3 (4) does not authorize such acquisition of a right to use portions of the facilities separate and apart from the unified whole. To this view as a matter of law we are unable to accede. Seeking only a right to a physical use as a tenant—a use embracing only such portion of the terminals as would be necessary in the conduct of its business—petitioner's interest in and relations to the terminal facilities would be unlike those of the proprietary lines. In our judgment section 3 (4) does not contemplate and should not receive such a restricted interpretation as would virtually defeat its practical aim and purpose where extensive terminals are concerned. The provisions should have a practical and workable application to practical situations. As a tenant line, seeking a right of user by condemnation for the purposes of a practicably separable physical use, there would appear to be no just ground upon which petitioner should, as a condition to any relief, be required to acquire and pay for a right to make use of portions of the terminals which it would not desire or need and upon which it would impose no additional burdens. The actual uses of different portions made by the different proprietary lines, and such separate physical use as has been and is now made by petitioner, disclosed by the record, indicate that the integrity of the terminals otherwise would suffer no impairment by the appropriated use; but in so

far as the contrary might appear it could and should, of course, be taken into account by appropriate allowance in the adjustment of compensation.

While it also is insisted that the act makes no provision for compensation for a condemned user in annual payments, as the petition seems to contemplate, it may be doubted that a real question in that behalf would arise. A use so taken and enjoyed from year to year, always subject to the possibility of a fortuitous interruption beyond the control of either party, present an aspect somewhat different from the usual expropriation of physical prop- [fol. 122] erty, which ordinarily becomes at once a completed transaction; but, aside from this, inasmuch as adequate security is provided by the act as an alternative to immediate payment, no serious difficulty should be encountered.

An incidental contention that the personal services which respondent renders the proprietary lines pursuant to the operating agreement can not in any case be made the subjects of condemnation does not appear to require consideration. It appears that special charges are made for such services rendered any line, and, so far as services of that character would be concerned, the matter should be left to negotiation between the parties. Switching services, of course, other than switching of passenger equipment to and from the union station, are offered without distinction at tariff rates.

A contention by the Rock Island, that we have no power to require, in effect, that intervener to increase its property investment in the respondent terminal company, of which it is already a proprietary, is faulty in its premise. If the before-mentioned decree shall be ultimately upheld, the increased burden or investment imposed upon each of the remaining proprietaries will have resulted from the provisions of the operating agreement, not from any order which we are asked by petitioner to enter.

We think that the objections to the service order set up in the plea and motion, reiterated on exceptions, are not well taken. What in our opinion was an emergency requiring immediate action existed in the situation, brought to our attention by the petition, in which petitioner appeared to be faced with the alternatives of submission to the franchise ordinance and operating agreement, notwithstand-

ing section 3 (4), or of exclusion from the terminals and consequent interference with its transportation service. The order prescribes for the time being petitioner's use of the terminals in accordance with the terms and provisions of the operating agreement and for the compensation therein provided, and reserves the question of ultimate compensation for the effective period of the order to future agreement between the parties, or, failing agreement, to determination by us. If left to us there will be opportunity to establish by competent evidence what the compensation should be. In either event respondent's interests are safeguarded, and a revisory judicial ascertainment will not be foreclosed. Dayton-Goose Creek Ry. v. United State, 263 U. S. 456, 485-6.

That the petitioner's future use of the terminal facilities, in furtherance of its transportation service, would be in the public interest and practicable, without substantially impairing respondent's ability to handle its own business, is adequately demonstrated by practical experience; and upon all the facts of record we find it so to be. Upon final determination of the cause pending in the courts, before [fol. 123] mentioned, respondent or petitioner, as the case may be, may appropriately certify the result to us. If the courts shall reverse their conclusion and hold petitioner bound by the operating agreement, respondent may move for a dismissal of the petition. On the other hand, if petitioner is finally adjudged not to be so bound, it may move for the entry of an order according it a right of user of the specified zones, upon such terms and for such compensation as the parties may then agree upon. If they are unable so to agree, we may be petitioned to reopen the proceeding for further hearing looking to a determination and prescription of terms and compensation in accordance with the provisions of the act, subject to payment or security therefor as provided. Jurisdiction will be retained accordingly.

Chairman Aitchison concurs in the results.

Commissioner McChord dissents in so far as relief is not accorded the small-user interveners.

Eastman, Commissioner, dissenting:

The present terminal arrangement in Kansas City has for a long time been a cause of bitterness and dissension.

It is also in sharp conflict with the public interest. The majority have done little to help matters. They not only fail to condemn but approve a principle which, if applied generally to the joint use of terminal facilities in the large cities of the country, would be disastrous. Because they are of such far-reaching public importance, I shall discuss at length certain of the questions which are raised by this case.

The Kansas City Terminal Railway Company is a common carrier whose chief function it is to provide other railroads with terminal facilities in Kansas City. It was created for ths purpose and, as is usual in such cases, it stock is owned, with the single exception which is explained in the majority report, in equal shares by the railroad companies which use its facilities. This stock interest is altogether insignificant in comparison wth the total cost of the property, beng in the ratio of about 1 to 50. Twelve different railroad companies now use these terminal facilities. Some of these companies are big and some are little; some are rich and some are poor; the use which they make differs widely in extent. Nevertheless the terms upon which the right to use has been granted require that they all shall pay equal shares of respondent's very heavy interest and tax charges. Operating expenses are divided in proportion to use, but not so fixed charges. The result is that some of the companies which are small users of the terminal facilities suffer a burden which is altogether disproportionate to the benefits accruing from the use, a burden which weighs upon them very heavily indeed. Two of these small [fol. 124] users are in receivers' hands, one is just emerging from receivership, and a fourth is a conspicuously weak company. Such disproportionate and heavy burdens upon roads of this character are necessarily reflected upon the public served. They are plainly a matter not of private interest alone, but of vital public concern.

The disproportionate burdens suffered by the smaller users may be illustrated by the fact that in 1923 the Chicago Great Western's share of the operating expenses, which were divided on the user basis, amounted to $40,324 and the Santa Fe's share to $671,849, whereas both companies paid a share of the fixed charges, which were equally divided among the users, amounting to $226,575. Many other illustrations might easily be given of the unequal way in which the total cost of furnishing these terminal facili-

ties is distributed, with the result that the payments made are altogether out of line with the benefits received; but the fact is patent and conceded.

If support were needed for the conclusion that the present arrangement burdens the small users disproportionately and unjustly, there is abundant evidence to furnish such support. It appears, for example, that there has been dissatisfaction with the arrangement and continual attempts to reform it ever since it became evident that the terminal would cost far more than had originally been estimated. Certain of the large users, as well as the small users, have joined in these attempts at reformation. The most recent attempt very nearly succeeded, only one road, the Santa Fe, standing out against its consummation. In the case of a certain issue of short-term notes it has been agreed by all, including the Santa Fe, and notwithstanding the contract, that the interest charges shall be apportioned upon the user basis. The contract itself has from the beginning provided that if a railroad wishes to use and is permitted to use a certain part of the terminal exclusively, it shall pay not only all the operating expenses but all the fixed charges allocated to that part. This is recognition that it is fair to apply the user basis to fixed charges, at least when the use amounts to 100 per cent.

The inequity of the arrangement is likewise attested by the fact that the user basis has so frequently been applied in similar situations throughout the country, not only to operating expenses, but also to fixed charges. The small users, indeed, assert that the Kansas City terminal is the only large union terminal of great cost in the United States which assesses interest on the numerical rather than on the user basis. This, perhaps, is an overstatement, but it is not far from the fact. The record shows that the user basis is applied, in one form or another, to fixed charges as [fol. 125] well as operating expenses of joint terminals in New York, N. Y., Chicago, Ill., Boston, Mass., St. Louis, Mo., Detroit, Mich., Cleveland, Ohio, St. Paul, Minn., Atlanta, Ga., Portland, Oreg., Washington, D. C., Memphis, Tenn., Chattanooga, Tenn., Birmingham, Ala., Richmond, Va., not to speak of others of lesser importance. The St. Paul case is of particular interest. There the St. Paul Union Depot Company is controlled, as in Kansas City, by stockholding tenants. A dispute having arisen as to the method of apportioning expenses and charges, it was re-

ferred to a board of referees and that board reported on September 24, 1923, to the following effect:

That all fixed charges (including interest on funded debt, amortization of discount and bond expense on funded debt, other interest paid on temporary loans for capital purposes, dividends payable), railway tax accruals, and all operating expenses, dues, and other charges, shall be apportioned upon a user basis.

The recent Cleveland union terminal agreement, which was in effect approved in The Cleveland Passenger Terminal Case, 70 I. C. C. 659, also apportions fixed charges as well as operating expenses on a user basis.

In the case before us two major questions are presented, so far as the small users generally are concerned: First, whether we have jurisdiction in the premises; and second, if we have jurisdiction, whether the facts are such as to warrant action on our part. As a preface to the consideration of the first question, let me state what I believe should be our attitude towards questions of law. This commission is not a court, and a party aggrieved by any affirmative order that we may enter has an opportunity to secure a review of law points in court. The commission was created because the business of the carriers is affected with a public interest, and to guard that interest. This being so, we should resolve doubts against an interpretation of the law which conflicts with the public interest, or, stating the proposition affirmatively, we should resolve doubts in favor of our jurisdiction to right wrongs which injuriously affect the public interest. If we are wrong, the courts will correct us, but at least we shall have given the interpretation which we believe coincides with the public interest a fighting chance for life.

In this case the intervening small users rely particularly upon paragraphs (1) and (3) of section 3 of the interstate commerce act.

Paragraph (1), so far as it has a bearing upon the situation before us, makes it unlawful for any carrier—

to make or give any undue or unreasonable preference or advantage to any particular company * * * corporation or locality * * * in any respect whatsoever, or to subject any particular * * * company * * * corporation

or locality * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[fol. 126] Paragraph (3) provides that all carriers—

shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines.

It would be difficult to find broader language than is used in paragraph (1). There is a sweeping prohibition of undue or unreasonable preference and prejudice, with nothing to define or limit those terms. Plainly, doubt surrounds the language used, a doubt that can only be resolved by external evidence, such as decisions of the courts interpreting the words in question or such as other provisions of the act. Much the same may be said of paragraph (3). It prohibits a carrier from discriminating in its "rates, fares, and charges" between connecting lines. What are the "charges" of a carrier, particularly in relation to connecting lines? Certainly, that word does not define itself, and in its interpretation it is again necessary to resort to external evidence.

In Smith v. Interstate Com. Comm., 245 U. S. 33, 45, the Supreme Court said:

"The outlook of the Commission and its powers must be greater than the interest of the railroads or that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided." And they must necessarily be expressed in generalities. A precise specification of the powers might work a limitation and all not enumerated be asserted to be withheld.

In Tap Line Cases, 234 U. S. 1, 29, the court said that the commission "has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or car-

riers." The Chicago Junction Case, 264 U. S. 258, 267, contains this statement:

It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. Pennsylvania Co. v. United States, 236 U. S. 351.

The case cited was a discrimination case under paragraphs (1) and (3) of section 3. In that decision the following very significant statement was made at page 366:

While section 3 remains part of the Act in its original form, it must be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective, in accordance with the intention of Congress.

At page 362, speaking of the same matter, the court said:

Section 3 was a part of the original Act, and remains unchanged, but there are certain amendments to the Act which are to be read in connection with section 3 as if they were originally incorporated within the Act.

[fol. 127] I take it that this can mean nothing else than that the meaning of a particular provision of the act may be modified and enlarged by amendments of other provisions or by additions to the act. It must be read "with a view to carrying out all the provisions of the act and to make every part of it effective." The conclusion, as I see it, is that the very broad and sweeping language of paragraphs (1) and (3) of section 3 must now be read in the light of the "new railroad policy" which the Supreme Court says was introduced into the Federal legislation by the transportation act, 1920. As evidence of this new policy let me quote from Dayton-Goose Creek Ry. v. United States, 263 U. S. 456, 478:

The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways opportunity to earn enough to maintain their properties and equipment in such a state of efficiency, that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more com-

pletely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, * * *. To regulate in the sense intended is to foster, protect and control commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.

Quoting from the New England Divisions Case, 261 U. S. 184, 189:

The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.

In Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563, 585, the same thought was thus expressed:

The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States.

In my judgment, paragraphs (1) and (3) were plainly susceptible, even before the passage of the transportation act, 1920, of a construction which would enable us to deal effectively with the situation presented by this case. But those who hold otherwise must now have in mind the new purpose infused into the act by the legislation of 1920. Court decisions interpreting the broad language of these paragraphs of inherently doubtful significance, rendered when public regulation was directed toward a certain end, are not necessarily controlling when that legislation has been directed as well toward other and different ends. And here there need be no hesitation as to the existence of these [fol. 128] other and different ends, for that fact has been repeatedly proclaimed by the Supreme Court in most positive and striking fashion, as the quotations above given and others which might be given plainly indicate. The lan-

guage of these paragraphs is so general and unrestricted in character that its interpretation must necessarily be influenced by the purposes which the act as a whole is designed to achieve.

In the Dayton-Goose Creek case, as we have seen, it was said that the "new act seeks affirmatively to build up a system of railways prepared to handle promptly all of the interstate traffic of the country." In fixing divisions we may even "take into consideration the financial needs of a weaker road" and give it a division "larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system.' " United States v. Abilene & So. Ry. Co., 265 U. S. 274, 284-5. Here we are confronted by a situation which has a vital bearing on the opportunity of certain weak lines to "earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden." The situation is one where respondent is withholding equal treatment from the railroads which use its facilities. The burden which some bear is altogether out of proportion to the use made and the benefits gained, and some of these small users are seriously hampered by this circumstance in the maintenance of good railway service. In my judgment, the language of paragraph (1) of section (3) is broad enough, particularly when read in the light of the new purpose which now pervades the interstate commerce act, to reach this unjustly discriminatory situation.

In my opinion, also, the same conclusion may be reached as to paragraph (3). Respondent is a carrier and its chief function is to provide other carriers with terminal facilities. In fulfilling that function it clearly performs a public service and the compensation which it exacts for such service is just as clearly affected with a public interest. Compensation might, and in analogous situations sometimes does, take the form of published tariff charges. Here it takes the form of stipulated payments into the treasury of the terminal carrier. It is a reasonable construction, and one which the new purpose of the act may well lead us to accept that these payments are "charges" which respondent exacts within the meaning of paragraph (3). In other words, the "charges" of which that paragraph speaks are all the charges, whatever their nature and form, which

are assessed for the public service or services which a carrier is created to perform.

Does the contract under which the payments for these terminal facilities are made prevent the exercise of our [fol. 129] jurisdiction in the premises? In view of the stress laid in this case upon the sanctity of contracts, it will not be amiss to quote the following from Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, 202:

It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The powers of government extend to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests. Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the States being one of them, the power is absolute except as limited by other provisions of the Constitution itself.

The opinion of the majority conveys the thought that the intervening small users are trying to persuade us to revise or rewrite the contract for the use of the terminal facilities. I do not so understand their position. Their contention is that no contract can stand in the way of the exercise in the public interest of our powers under the act; and this doctrine is, indeed, admitted and amply supported by citations in the majority opinion. When we exercise such powers in conflict with the provisions of a contract, we do not undertake to revise or reform that contract. We merely direct that certain things be done. If they can be done under the contract, well and good. If they can not be done under the contract, it must be disregarded. When, for example, we required the establishment of passenger fares at the rate of 3.6 cents per mile over the main line of the New York Central within the State of New York, we did not undertake to revise the contract between the State and the railroad which was a part of the latter's charter and provided for a 2-cent per-mile rate. We merely

required the rate to be 3.6 cents per mile regardless of the contract. Our power in this respect is wholly different from that of a court of equity which undertakes to reform a contract for the benefit of one of the parties to it. We do not seek to enforce the principles of equity but only to administer certain legislative provisions for the protection of the public interest, against which provisions a contract is no bar.

Furthermore, the fact that here the 12 railway companies entered into a contract with respondent which resulted in the discrimination in no way estops them from seeking affirmative relief against this discrimination through the exercise of our powers in the public interest. This was clearly established in the Los Angeles Switching Case, 234 U. S. 294, 312-3, where Justice Hughes said:

It is further urged that while the contracts for the construction of these spurs did not fix the charge, it was proved by undisputed evidence that at the time these contracts were made the shippers consented to a special charge, if freight [fol. 130] were received and delivered thereon, and that the charge in question had been generally maintained. The service, however, was performed subject to the law of the land requiring that the carrier's charges should not be unreasonable or unjustly discriminatory. * * * If it became apparent that the shippers were subjected to an arbitrary and unwarranted exaction, they were in no way estopped from bringing the matter before the body created by law to deal with such questions and from securing its order directing the carrier to stop the objectionable practice.

It is quite true that if we were concerned with the small users alone we might well leave them to a fate which they apparently invited and embraced, and in all probability we could do nothing else. But our concern is with the public interest from which our jurisdiction springs. No negligence or unwisdom or dereliction upon the part of the small users can justify us in disregarding that public interest by permitting an unjust discrimination to continue which injuriously affects that interest.

Returning to the opinion of the majority, it will be noted that no conclusion is reached that we are without jurisdic-

tion in the premises under paragraphs (1) and (3) of section 3 or that the contract is a bar to the exercise of such jurisdiction. The conclusion, so far as it affects the question that I am now discussing, is quite different. In view of its importance I shall quote this conclusion in full:

Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportion of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

This finding merits analysis, for if I am right it is wrong in every important respect. In the first place, let us consider the statement that the charges in question are "distinctly capital chargees, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make." Reference to the contract will show that the Kansas City Terminal Railway Company is the party of the first part and that the so-called proprietary [fol. 131] lines are the parties of the second part. The mutual covenants of these parties are preceded by the following paragraph:

Whereas, each of the railway companies parties of the second part hereto (hereinafter collectively referred to as the Railway Companies) desires, for purposes of greater

economy and convenience, to avail itself of the services of the Terminal Company and the use of said Union Passenger Station, line of railroad, track, and all other facilities of the Terminal Company; and the Terminal Company is willing to serve the Railway Companies and to grant to the Railway Companies the right to use all the facilities of the Terminal Company upon the terms and conditions hereinafter set forth:

The terminal company, "in consideration of the sums to be paid by the Railway Companies respectively as hereinafter provided," covenants and agrees to build the station and the other facilities and to grant the right to use the same to each of the railway companies upon certain conditions during the term of 200 years. Among the sums which the railway companies covenant to pay to the terminal company in consideration of this right of use are the sums covering interest and tax charges. These sums are "payable to the Terminal Company or pursuant to its written order." They are not distinguishable in purpose or category from the sums which the railway companies covenant to pay covering the expenses of maintenance and operation, and like those latter sums they clearly form part of the consideration for the right to use the terminal facilities. Further evidence of this fact is afforded by the provision that in case of default by any of the railway companies in the payment of any sum due under the contract, including the sums covering interest and tax charges, the penalty for such default is exclusion from the use of the terminal facilities. It will thus be seen that the statement in the finding quoted above is incomplete and misleading, that "for their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions." The payments on account of maintenance and operating expenses form part of the consideration paid for the right to use the terminal facilities, but only a part, the remainder consisting of the payments on account of interest and tax charges.

The finding continues with the thought, as I understand it, that the payments on account of interest and tax charges are not unduly prejudicial or preferential or unjustly discriminatory, because "each proprietary pays an equal share of the aggregate interest and taxes upon its equal share

in the aggregate property." This is a complete non sequitur. It confuses the status of the railway companies as stockholders of the terminal company with their status as users of its terminal facilities. Stockholders are under no obligation to make payments into the treasury of their [fol. 132] company for the purpose of meeting any of its charges or, indeed, to make such payments for any purpose except in return for a quid pro quo. So far as compensation for the right to use the terminal facilities is concerned, the fact that these railway companies hold stock of the terminal company certainly can not make charges just which would be unjust if they had no stock interest. It might as well be argued that a shipper who owns stock in a railroad company can justly and lawfully be required to pay for freight service on a different basis from shippers who either do not own stock at all or do not own as much.

If the majority are right in the thought that the equal shares of the aggregate interest and taxes are justified by the equal shares in the aggregate property, then it would follow that if one of the railway companies happened to own all of the stock of the terminal company it would be just that such railway should pay all of the interest and taxes regardless of the use which it makes of the terminal facilities. Likewise, if one of the railway companies owned 45 per cent of the stock and the remainder were divided among the other 11 railway companies in equal shares of 5 per cent each, it would be fair that these proportions should determine the respective shares of interest and taxes. Moreover, it would seem to follow that if this joint terminal arrangement in Kansas City is not unduly prejudicial or preferential or unjustly discriminatory, then the joint terminal agreements so common in other cities, where fixed charges are apportioned upon a user basis, must be within the condemnation of the law. The record shows that the Santa Fe would pay $379,517 per year more on the user basis than it now pays, while the Chicago Great Western would pay $144,881 less. Methods which result in such discrepancies can not both be right. In most of these other cities the stock of the terminal company is owned by the using lines, just as it is here.

There is only one ground upon which these payments for the use of the terminal facilities, which are so obviously disproportionate to the actual uses made, could conceivably be held to be free from undue prejudice or unjust discrim-

ination. That ground, which is not mentioned by the majority, is that the right to use is equal regardless of the extent to which the railway companies avail themselves of this right. That is to say, there is equality of opportunity. One answer to that is that here the right to use is not in all cases equal, since the terminal property is divided into zones and the right to use is confined to such zones as each company selects for its own particular purposes. A more [fol. 133] important answer is that the right to use can not justly, in actual practice, be separated from the ability to avail of that right. It is perfectly obvious that where the railway companies differ so widely in size and in the physical location and characteristics of their lines entering the city, rights to use the terminal facilities are of wholly unequal importance and value. There is no way in which these differences in importance and value can be accurately measured except by the test of the actual use made. That is demonstrated by the widespread adoption of the user basis in similar situations, and was so found by the board of referees in St. Paul. Indeed, if any other basis should generally be required in agreements for joint use of terminal facilities in large cities, the extension and development of such highly desirable arrangements would probably come to an end.

The majority opinion reflects the thought that fixed charges and taxes incurred in the furnishing of service are not to be regarded as a part of the "cost" of that service and in this respect are to be sharply distinguished from maintenance and operating expenses. In determining the amount which ought to be paid for service there is no valid basis for such a distinction. When a railroad fixes its rates for freight or passenger service, it quite properly attempts to fix them at amounts which will cover not only expenses of operation, but taxes, interest, and a reasonable profit as well. It does not seek to collect its taxes and interest from its stockholders. Neither does it seek to collect from each user of its freight or passenger service an equal share of interest and taxes. All pay in proportion to the service that they receive, i. e., upon the user basis. There is no good reason why a common-carrier terminal company whose public service is the furnishing of terminal facilities to other railway companies should charge for that service upon any different basis.

The principle was well set forth by counsel for the terminal company in St. Louis in a statement which is quoted in United States v. St. Louis Terminal, 224 U. S. 383, 388, as follows:

Every consideration of a public nature points to a consolidation of the terminals and to a common use of them by all the railroad companies coming into the city. But to avoid the odious phases of a monopoly, this use must be open to all upon equal terms. The charge for service in any case can be stated in one word—cost. No money received for the service rendered goes to any other purpose than paying expenses of operation, taxes, fixed charges, and proper maintenance. No dividends are paid upon terminal shares, and no proprietary railroad company is a beneficiary of fixed charges. Any new railroad built into St. Louis now has but to secure a way to a terminal track and it has at once the advantages of the entire terminal system.

As I stated at the outset, this is a matter of great public importance. The railroads of the country have been put under our "fostering guardianship and control" in order [fol. 134] that they may have an "opportunity to earn enough to maintain their properties and equipment in such a state of efficiency" that they can "handle promptly all the interstate traffic of the country." In the furtherance of that desirable end, we may even give a weaker road divisions "larger than justice merely as between the parties would suggest in order to maintain it in effective operation as part of an adequate transportation system." Here the majority find that we may not even go so far as the ends of justice would suggest, and that we must allow burdens which are plainly disproportionate and unreasonable to remain upon the small users, notwithstanding the injurious effect upon the public interest. I can not accept this conclusion. I believe it to be wrong and I am persuaded that we have ample power to deal effectively with the situation.

Summing up the case, the record justifies a finding that the respondent terminal company, under the arrangements now in effect, is giving an undue and unreasonable advantage and preference to the larger users of its terminal facilities, to the undue and unreasonable prejudice and disadvantage of the smaller users, including the petitioner,

contrary to the provisions of paragraph (1) of section 3 of the interstate commerce act, and that it is also unjustly discriminating in its charges as between connecting lines, contrary to the provisions of paragraph (3) of the same section. For the present I would enter no order and go no further than this finding, leaving the companies free to effect, if they can, a voluntary adjustment of the matter.

I am authorized to state that Commissioner Campbell concurs in this dissent.

[fol. 135] Order

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 10th Day of November, A. D. 1925.

No. 15682

Missouri-Kansas-Texas Railroad Company

v.

Kansas City Terminal Railway Company

This case being at issue upon petition, answer, and other pleadings on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the intervening petitions heretofore filed in the above-entitled proceeding by the Chicago & Alton Railroad Company and receivers thereof, Chicago Great Western Railroad Company, Kansas City Southern Railway Company, St. Louis-San Francisco Railway Company, Chicago, Milwaukee & St. Paul Railway Company, and Wabash Railway Company be, and they are hereby, dismissed.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 136] EXHIBIT 6 TO PETITION

Stock Trust Agreement Relating to Stock of Kansas City Terminal Railway Company, dated June 12th, 1909

First Supplemental Stock Trust Agreement, Dated January 24th, 1910, and Instruments Appointing the First National Bank of Kansas City as Successor Trustee Under the Stock Trust Agreement and Supplemental Stock Trust Agreement

[fol. 137] Stock Trust Agreement Between The Atchison, Topeka and Santa Fe Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis and San Francisco Railroad Company, Union Pacific Railroad Company, The Chicago and Alton Railroad Company, The Wabash Railroad Company, Missouri, Kansas and Texas Railway Company, The Missouri Pacific Railway Company, and Chicago, Burlington and Quincy Railroad Company, of the first part, and Pioneer Trust Company, of Kansas City, Mo., of the second part, and Kansas City Terminal Railway Company, of the third part

Relating to Stock of the Kansas City Terminal Railway Company

Dated June 12th, 1909.

[fol. 138] Agreement, made this 12th day of June, 1909, between The Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas; Chicago, Milwaukee and St. Paul Railway Company, a corporation of the State of Wisconsin; The Chicago, Rock Island and Pacific Railway Company, a corporation of the States of Illinois and Iowa; St. Louis and San Francisco Railroad Company, a corporation of the State of Missouri; Union Pacific Railroad Company, a corporation of the State of Utah; The Chicago and Alton Railroad Company, a corporation of the State of Illinois; The Wabash Railroad Company, a consolidated corporation, organized under the laws of the State of Missouri and other States; Missouri, Kansas and Texas Railway Company, a corporation of the State of Kansas; The Missouri Pacific Railway Company, a con-

solidated corporation organized under the laws of the States of Missouri, Kansas and Nebraska; Chicago, Burlington and Quincy Railroad Company, a corporation of the State of Illinois (hereinafter referred to as the Railway Companies), parties of the first part, and Pioneer Trust Company, a corporation of the State of Missouri (hereinafter called the Trustee, which expression wherever herein used shall include any successor or successors to such Trustee, in the trust hereby created), party of the second part; and Kansas City Terminal Railway Company, a corporation of the State of Missouri, party of the third part:

Whereas, the Kansas City Terminal Railway Company (hereinafter called the Terminal Company), a corporation organized and existing under and by virtue of the laws of [fol. 139] the State of Missouri, is about to execute to Samuel W. Moore, a citizen of the State of Missouri, and to Illinois Trust and Savings Bank, a corporation of the State of Illinois, as trustees, a certain mortgage or deed of trust to secure an issue of $50,000,000.00 par value of the first mortgage, four per cent. gold bonds of the Terminal Company, which mortgage is to be substantially of the tenor of Exhibit "A" hereto attached; and

Whereas each of the Railway Companies has acquired and owns an equal number of shares, to-wit: one thousand shares, of the capital stock of the Terminal Company and the Railway Companies are about to enter into an agreement with the Terminal Company and the said Illinois Trust and Savings Bank, as Trustee, substantially of the tenor of Exhibit "B" hereto attached, whereby among other things the Terminal Company grants to the Railway Companies the right to use for the term of two hundred years its union passenger station and certain other terminal facilities, as set forth in said Exhibit B, and the Railway Companies covenant and agree to pay the interest on said bonds and all other fixed charges and taxes and the maintenance and operating expenses of the Terminal Company; and each of the Railway Companies as an inducement to the execution by the other Railway Companies of such Exhibit B, and in consideration thereof, and for other valuable considerations, has agreed with the other Railway Companies, and each of them, to execute these presents and to assign and transfer to the Trustee all said shares of the capital

stock of the Terminal Company acquired by such Railway Company (except five shares reserved by each of said railway companies) for the purpose of securing the due and punctual performance of this agreement and of such other agreement Exhibit B.

[fol. 140] Now, therefore, it is mutually agreed by and between the parties hereto as follows:

Article I

Stock of Terminal Co. delivered to Trustee.

Section 1. This agreement shall be executed by the parties in twelve uniform originals; one of which shall be delivered to each of the parties.

Each of the Railway Companies agrees forthwith to deliver to the Trustee the certificates for nine hundred and ninety-five shares of the capital stock of the Terminal Company, such certificate being accompanied, in each case, by instruments of assignment and powers of attorney for the transfer of such shares upon the books of the Terminal Company into the name of the Trustee as hereinafter provided.

The Trustee, forthwith, shall cause the shares represented by the certificates delivered by each of the Railway Companies to be transferred upon the books of the Terminal Company into the name of the Trustee, as trustee for such Company subject to the provisions of this agreement.

Trustee entitled to rights of stockholders.

Each of the Railway Companies hereby sells, assigns and transfers to the Trustee the shares in the Terminal Company represented by said certificates delivered by it to the Trustee; and the Trustee shall have and be entitled to exercise all the rights and powers of a stockholder in respect of the said shares, including the right to collect and receive all dividends that shall be declared upon such shares and the right to vote upon such shares at all meetings of stockholders of the Terminal Company subject to the terms and conditions of this agreement.

All said shares in the Terminal Company shall be held by the Trustee upon trust for the purposes and upon the terms and conditions herein expressed, until delivered, transferred or surrendered as herein provided.

Additional stock of Terminal Co. to be

[fol. 141] Sec. 2. As often as the Terminal Company shall issue additional capital stock, the same shall be offered to the Railway Companies not then in default, in equal

amounts; and they each severally agree to subscribe and pay for the same upon such terms as may be agreed upon, or in default of such agreement, upon such terms as may be fixed and determined by the Terminal Company, to the end that the interest of each Railway Company, not in default, represented by its ownership of capital stock of the Terminal Company may at all times be equal; and any and all stock so subscribed and paid for shall forthwith be delivered and transferred to the Trustee, and all the terms and provisions of this agreement shall apply thereto to the same extent as to the stock now owned by the Railway Companies and transferred to the Trustee under this agreement; provided, that if, at any time hereafter, any railway company, not now a party to Exhibit B and not then a party thereto by succession, as therein provided, shall have acquired any portion of the capital stock and shall have executed (1) an agreement with the Terminal Company substantially in accordance with the terms of Exhibit B, and (2) an agreement with the parties hereto, substantially in accordance with the terms of this contract, such railway company shall be deemed and considered one of the Railway Companies for all the purposes of this section.

taken by Railway Companies.

Provisions of this agreement to apply.

New Companies admitted.

Article II

Section 1. Each of the Railway Companies covenants and agrees to and with each of the other Railway Companies as follows:

Railway Companies agree.

(a) To execute said agreement substantially as set forth in said Exhibit B.

To execute Exhibit B.

[fol. 142] (b) To pay promptly when due every sum that may become payable by it under said agreement Exhibit B, and to perform and comply with all the terms, covenants and provisions of said Exhibit B.

To make payments required by Exhibit B.

(c) From time to time, upon demand of the Trustee, to pay the same proportion of the expenses of the trust hereunder, including the reasonable compensation of the Trustee and all expenses that may be incurred in preserving the pledged stock and of defending and enforcing the rights and interests of the parties hereto in respect of said stock or under this agreement, as it shall be required to contribute to the payment of interest and the principal

To pay expenses of this trust.

of mortgage bonds as provided in said Exhibit B; and also to the same extent, to indemnify the Trustee against all damage and liability while acting hereunder, and also from time to time, upon demand of the Trustee, to pay the taxes, if any, assessed upon the stock by such Railway Company pledged hereunder and then held by the Trustee.

Railway Companies to be reimbursed.

Sec. 2. If any of the Railway Companies shall be required to make any payment under paragraph (c) of Section 1 of this Article on account of the default of any other Railway Company or Railway Companies, then the claim or claims of the Trustee against the Railway Company or Railway Companies in default shall be held and enforced by the Trustee for the Railway Companies that made such payment, and any sum or sums received or collected from such Railway Company or Railway Companies in default shall be applied ratably to reimburse, with interest at the rate of seven per cent per annum, the Railway Companies which made such payments.

Payments made to Trustee.

Sec. 3. Every sum payable by any of the Railway Companies to any other of the Railway Companies under any provision of this instrument shall be payable by depositing [fol. 143] the same with the Trustee to the credit of the Railway Company to which such sum is payable; and upon receipt thereof by the Trustee such sum shall be paid by the Trustee to such Railway Company upon demand.

"Exhibit B" defined.

Sec. 4. Exhibit B as used herein shall be deemed to include the said contract as originally executed and as it may be subsequently amended or modified by the parties to it as therein provided. The expression "the Railway Companies" shall include the Railway Companies and each of them parties to this agreement and any other railway company which shall have acquired any portion of the capital stock of the Terminal Company and shall have become a party to Exhibit B and to this agreement; and also such of the successors of said Railway Companies as shall succeed to the rights and privileges of the said contract Exhibit B and become bound by its obligations; provided that no such successor Railway Company shall have any beneficial interest in the capital stock of the Terminal Company pledged by its predecessor under this agreement until such successor Railway Company shall have become a party to this contract.

"Railway Companies" defined.

Article III

Rate of interest payable on default.

Section 1. In case any one of the Railway Companies parties hereto shall make default in payment of any sum which shall be payable by it under said Exhibit B or under this instrument, then the Railway Company in default shall be liable to pay interest thereon at the rate of seven per cent per annum until such sum shall be fully paid.

Default by any Railway Company.

Sec. 2. In case any one of the Railway Companies parties hereto shall be in default in respect to any payment to be made under said Exhibit B, or under this instrument, or in the performance of any of its covenants or agreements [fol. 144] herein contained, then until such Railway Company shall have paid such sum with interest as aforesaid or shall have complied with such covenant or agreement,

Stock of company in default.

each of the other Railway Companies, not being in default, shall be entitled to vote upon a proportion of the shares transferred by the Railway Company in default to the Trustee, and then held by the Trustee hereunder, at all meetings of the stockholders of the Terminal Company for the election of directors and for all other purposes, which shall be as one to the whole number of the Railway Companies not then in default, and the Trustee shall execute and deliver to each of said Railway Companies not then in default a power of attorney appointment such Railway Company or any person or persons that may be designated by such Railway Company in writing, the attorney, agent and proxy of the Trustee, with powers of substitution, to vote upon such proportion of such shares at all such meetings of the stockholders of the Terminal Company; and

Proxies.

Stock of company excluded, held for joint benefit of companies not in default.

Sec. 3. If any of the Railway Companies, parties hereto, shall be excluded from the use of the Terminal Facilities, as provided in Exhibit B, and particularly in Section 13 of Article III thereof, then the Trustee shall thereafter hold the shares transferred to it by the Railway Company so excluded from the use of the Terminal Facilities, for the joint use and benefit of the other Railway Companies, parties hereto, which may then be entitled under the provisions of Exhibit B to use and enjoy the Terminal Facilities; and each of the Railway Companies hereby agrees with the Trustee, and with each of the other Railway Companies, to release and relinquish to the Trustee all further right,

title or interest in or to its said shares, and that this instrument shall operate as a release and relinquishment thereof, in the event that it shall be excluded from the use of the Terminal Facilities as aforesaid, and consents and requests [fol. 145] that the Trustee shall thereafter hold said shares, under the terms of this instrument, for the joint use and benefit of the other Railway Companies which may then be entitled to use the Terminal Facilities under the terms of Exhibit B; provided, that if any of the Railway Companies, parties hereto, after being excluded from the use of the Terminal Facilities as provided in Exhibit B, and particularly in Section 13 of Article III thereof, shall be reinstated and become entitled to use said Terminal Facilities, as therein provided, the Trustee shall thereafter, and so long as such Railway Company shall be entitled to use the Terminal Facilities under Exhibit B, hold the shares of stock transferred to it by such Railway Company under the terms of this agreement in the same manner and to the same extent as though such Company had never been excluded from the use of the Terminal Facilities.

Railway Company in default may be reinstated.

Article IV

Railway Company not in default entitled to dividends.

Section 1. Each of the Railway Companies, if and so long as it shall not be in default in making payment of any sum by it payable under said Exhibit B, or under this instrument or in the performance of any of the covenants and agreements herein contained, shall be entitled to receive from the Trustee all dividends received or collected by the Trustee upon the shares transferred by such Railway Company to the Trustee and then held by the Trustee hereunder; and the Trustee shall pay over to such Railway Company all such dividends that shall be collected or received by the Trustee upon such shares; but if and so long as any Railway Company shall be in default, as aforesaid, any dividends upon the shares of the Terminal Company, transferred by such defaulting Railway Company to the [fol. 146] Trustee, received by the Trustee during such default, shall be forthwith paid over by the Trustee to the other Railway Companies not then in default, in equal shares.

Dividends of Railway Company in default.

Article V

Section 1. Each of the Railway Companies, if and so long as it shall not be in default in making payment of any sum by it payable under said Exhibit B or under this instrument or in the performance of any of its covenants or agreements herein contained, shall be entitled to vote at all meetings of the stockholders of the Terminal Company for the election of directors and for all other purposes, upon all the shares in the Terminal Company transferred by such Railway Company to the Trustee and then held by the Trustee, upon its proportion of shares transferred to the Trustee by any Company or Companies in default, as provided in Section 2 of Article III hereof, and upon its proportion of shares held by the Trustee for the joint use and benefit of the Railway Companies then entitled to the use and benefit of the Terminal Facilities as provided in Section 3 of Article III hereof; and the Trustee shall from time to time execute and deliver to it a power of attorney appointing such Railway Company or any person or persons that may be designated by such Railway Company in writing, the attorney, agent and proxy of the Trustee, with power of substitution, to vote upon such shares at all meetings of the stockholders of the Terminal Company held within ninety days after the date of such power of attorney; provided, however, that any such power of attorney shall be cancelled and terminated by the execution and delivery by the Trustee of any power of attorney under the provisions of Section 2 of Article III of this agreement, and shall also be terminated as to any Company by the [fol. 147] exclusion of such Company from the use of the Terminal Facilities, as provided in Exhibit B, and particularly in Section 13 of Article III thereof; and such power of attorney shall also be cancelled and terminated, and a new power of attorney shall be issued by the Trustee in favor of any company which, during such period of 90 days, shall make up any default previously existing.

Railway Company not in default entitled to vote stock.

Transferred by it to the Trustee.

Held by Trustee account default or exclusion of other company.

Proxies executed by Trustee.

Proxy may be cancelled.

Article VI

Section 1. This agreement may be terminated at any time by an instrument in writing executed by the Trustee and by each of the Railway Companies parties hereto not then in default; but unless previously so terminated this agreement shall continue in force, so long as Exhibit B

This agreement may be terminated.

shall remain in force. In case of any such termination of this agreement the Trustee shall redeliver and retransfer to each of the Railway Companies not then in default any shares transferred by it to the Trustee and shall also transfer and deliver to each of the Railway Companies not then in default, a proportion of any shares then held by the Trustee for the joint use and benefit of such Railway Companies, under Section 3 of Article III hereof, which shall be as one to the whole number of Railway Companies not then in default, upon payment by such Railway Company of all sums by it payable under said Exhibit B or under this instrument to the Terminal Company or to any of the other Railway Companies or to the Trustee.

Article VII

Purpose of this agreement.

Section 1. The Trustee has become party to these presents only for the purpose of signifying its acceptance of the trusts hereunder; the Terminal Company has become a party to these presents to signify its assent to the provi- [fol. 148] sions of Section 2 of Article 1; it being understood that this agreement is made for the purpose of furnishing to each of said Railway Companies security for the performance by each of the other Railway Companies of its covenants and agreements contained in said Exhibit B and in this instrument; that the provisions of this agreement shall in no manner impair or affect any of the terms, conditions or provisions of said mortgage or deed of trust for the benefit of the trustees thereunder or for the holders of the bonds thereby secured or any of the terms, conditions or provisions of said agreement Exhibit B.

Article VIII

Notices, how given.

Section 1. Any demand, request, notice, designation or selection to be made by the Railway Companies or any of them under any provision hereof shall be sufficiently given and served if signed by the president or a vice-president or by the chairman of the executive committee or by the comptroller or by the secretary or an assistant secretary of the Railway Company in whose behalf the same shall purport to be made and delivered to or served upon any one of such officers of any of the other Railway Companies.

Article IX

Trustee may resign or be removed.

Section 1. The Trustee, or any successor trustee, may resign and be discharged from the trust created by this agreement by giving to each of the Railway Companies notice in writing of such resignation and specifying the date when such resignation shall take effect. Such resignation shall take effect from the date specified in such notice unless previously a successor trustee shall be appointed as hereinafter provided, in which event such resignation shall take effect immediately upon the appointment of such [fol. 149] successor trustee. The Trustee or any successor trustee may be at any time removed from the trusteeship by a majority of the Railway Companies not then in default by an instrument in writing, duly signed by them or by their attorneys duly authorized. Upon removal the trustee so removed shall be entitled to the payment of its reasonable charges for the services rendered by it and the expenses incurred by it in the management of the trust.

Appointment of successor Trustee.

Sec. 2. In case a vacancy shall exist at any time in the trusteeship hereunder from whatever cause arising, a majority of the Railway Companies not then in default may by written appointment under their respective hands appoint a new trustee, or successor trustee; the new appointment of a trustee, or successor trustee, as herein provided, shall be effectual to vest in such trustee so appointed the appropriate authority, rights, powers and duties herein provided in that behalf; and in every case of resignation by trustee or of removal of a trustee, the trustee so resigning or removed shall at the request of any of the Railway Companies or of the trustee so appointed assign, transfer and deliver to such successor trustee all moneys, shares of stock, rights, contracts, choses in action, evidences of indebtedness and all other matters or things then held by it as such trustee under this agreement.

In witness whereof, each of the parties hereto has caused these presents to be signed by its president or one of its vice-presidents and its corporate seal to be hereunto affixed and attested by its secretary or an assistant secretary the day and year first above written.

[fol. 150] The Atchison, Topeka and Santa Fe Railway Company, By E. P. Ripley, President. (Seal.)

Attest: Edward McBride, Assistant Secretary.

Chicago, Milwaukee and St. Paul Railway Company, by A. J. Earling, President. (Seal.)

Attest: E. W. Adams, Secretary.

The Chicago, Rock Island and Pacific Railway Company, by H. U. Mudge, President. (Seal.)

Attest: Geo. H. Crosby, Secretary.

St. Louis and San Francisco Railroad Company, by B. L. Winchell, President. (Seal.)

Attest: F. H. Hamilton, Secretary.

[fol. 151] Union Pacific Railroad Company, by R. S. Lovett, President. (Seal.)

Attest: Alex. Millar, Secretary.

The Chicago and Alton Railroad Company, by T. P. Shonts, President. (Seal.)

Attest: J. Steuart Mackie, Secretary.

The Wabash Railroad Company, by F. A. Delano, President. (Seal.)

Attest: E. B. Pryor, Asst. Secretary.

Missouri, Kansas and Texas Railway Company, by A. A. Allen, President. (Seal.)

Attest: C. N. Whitehead, Secretary.

[fol. 152] The Missouri Pacific Railway Company, by C. S. Clarke, Vice-President. (Seal.)

Attest: F. W. Irland, Assistant Secretary.

Chicago, Burlington and Quincy Railroad Company, by Geo. B. Harris, President. (Seal.)

Attest: H. W. Weiss, Asst. Secretary.

Pioneer Trust Company of Kansas City, Mo., by Walton H. Holmes, President. (Seal.)

Attest: B. H. McGarvey, Secretary.

Kansas City Terminal Railway Company, by Horatio L. Harmon, President. (Seal.)

Attest: C. C. Ripley, Secretary.

[fol. 153] STATE OF MISSOURI,
County of Jackson, ss:

On this 29th day of July, in the year 1909, before me appeared Horatio L. Harmon, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Kansas City, in the State of Missouri; that he is the president of Kansas City Terminal Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its board of directors, and that he signed his name thereto by like order; and said Horatio L. Harmon acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Grace L. Forbes, Notary Public, Jackson County, Missouri. My commission expires on the 2nd day of May, 1912. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 26th day of October, in the year 1909, before me personally came E. P. Ripley, to me personally known, who being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is [fol. 154] the president of The Atchison, Topeka and Santa Fe Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by

like order; and said E. P. Ripley acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Agnes K. Donohue, Notary Public, Cook County, Illinois. My commission expires on the 22nd day of May, 1911. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this first day of November, in the year 1909, before me personally came A. J. Earling, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago in the State of Illinois; that he is the president of Chicago, Milwaukee and St. Paul Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name [fol. 155] thereto by like order; and said A. J. Earling acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

W. D. Millard, Notary Public, Cook County, Illinois. My commission expires on the 11th day of May, 1912. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 18th day of December, in the year 1909, before me personally came H. U. Mudge, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of The Chicago, Rock Island and Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his

name thereto by like order; and said H. U. Mudge acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

C. Nyquist, Notary Public, Cook County, Illinois. My commission expires on the 5th day of August, 1911. (Seal.)

[fol. 156] STATE OF MISSOURI,
City of St. Louis, ss:

On this 23rd day of December, in the year 1909, before me personally came B. L. Winchell, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of St. Louis, in the State of Missouri; that he is the president of St. Louis and San Francisco Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said B. L. Winchell acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Kate L. Worley, Notary Public, City of St. Louis, Missouri. My commission expires on the 22nd day of November, 1911. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 15th day of December, in the year 1909, before me personally came R. S. Lovett, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of New York, in the State of New York; that he is the president of Union Pacific Railroad Company, one of the corporations described in and which executed [fol. 157] the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its board

of directors, and that he signed his name thereto by like order; and said R. S. Lovett acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Walter H. Smith, Notary Public, New York County, New York. My commission expires on the 30th day of March, 1910. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 9th day of November, in the year 1909, before me personally came T. P. Shonts, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of New York, in the State of New York; that he is president of The Chicago and Alton Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said T. P. Shonts acknowledged said instrument to be the free act and deed of said corporation.

[fol. 158] In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Chas. R. Bosse, Notary Public, New York County, N. Y. My commission expires on the 30th day of March, 1911. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 18th day of November, in the year 1909, before me personally came F. A. Delano, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of The Wabash Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order;

and said F. A. Delano acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

John De La Mater, Notary Public, Cook County, Illinois. My commission expires on the 12th day of August, 1913. (Seal.)

[fol. 159] STATE OF MISSOURI,
City of St. Louis, ss:

On this 5th day of January, in the year 1910, before me personally came A. A. Allen, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Dallas, in the State of Texas; that he is the president of Missouri, Kansas and Texas Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said A. A. Allen acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Lee W. Hagerman, Notary Public, City of St. Louis, Mo. My commission expires on the 15th day of March, 1912. (Seal.)

STATE OF MISSOURI,
City of St. Louis, ss:

On this 8th day of January, in the year 1910, before me personally came C. S. Clarke, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of St. Louis, in the State of Missouri; that he is the vice-president of The Missouri Pacific Railway Com-[fol. 160] pany, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said C. S. Clarke acknowledged

said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

George C. Donovan, Notary Public, City of St. Louis, Missouri. My commission expires on the 9th day of November, 1911. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

On this 29th day of November, in the year 1909, before me personally came George B. Harris, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Chicago, in the State of Illinois; that he is the president of the Chicago, Burlington and Quincy Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order; and said George B. Harris ac- [fol. 161] knowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

J. H. Pettibone, Notary Public, Cook County, Illinois. My commission expires on the 12th day of March, 1910. (Seal.)

STATE OF MISSOURI,
County of Jackson, ss:

On this 11th day of July, in the year 1910, before me personally came Walton H. Holmes, to me personally known, who, being by me duly sworn, did depose and say that he resides in the city of Kansas City, in the State of Missouri; that he is the president of Pioneer Trust Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation, by order of its board of directors, and that he signed his name thereto by like order;

and said Walton H. Holmes acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Lilah M. Lykins, Notary Public, Jackson County, Missouri. My commission expires on the 14th day of July, 1913. (Seal.)

[fol. 162] First Supplemental Stock Trust Agreement Between The Atchison, Topeka and Santa Fe Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis and San Francisco Railroad Company, Union Pacific Railroad Company, The Chicago and Alton Railroad Company, The Wabash Railroad Company, Missouri, Kansas and Texas Railway Company, The Missouri Pacific Railway Company, and Chicago, Burlington and Quincy Railroad Company, of the first part, and The Kansas City Southern Railway Company, and Chicago Great Western Railroad Company, of the second part, and Pioneer Trust Company, Trustee Company of Kansas City, Missouri, of the third part, and Kansas City Terminal Railway Company, of the fourth part

Relating to Stock of the Kansas City Terminal Railway Company

Dated January 24th, 1910.

[fol. 163] Agreement, made this twenty-fourth day of January, 1910, between The Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas; Chicago, Milwaukee and St. Paul Railway Company, a corporation of the State of Wisconsin; The Chicago, Rock Island and Pacific Railway Company, a corporation of the States of Illinois and Iowa; St. Louis and San Francisco Railroad Company, a corporation of the State of Missouri; Union Pacific Railroad Company, a corporation of the State of Utah; The Chicago and Alton Railroad Company, a corporation of the State of Illinois; The Wabash Railroad Company, a consolidated corporation organized under the laws of the State of Missouri and other states; Missouri, Kansas and Texas Railway Company, a corporation of the State of Kansas; The Missouri Pacific

Railway Company, a consolidated corporation organized under the laws of the States of Missouri, Kansas and Nebraska; Chicago, Burlington and Quincy Railroad Company, a corporation of the State of Illinois (hereinafter collectively called the "Old Companies"), parties of the first part; The Kansas City Southern Railway Company, a corporation of the State of Missouri, and Chicago Great Western Railroad Company, a corporation of the State of Illinois (hereinafter collectively called the "New Companies"), parties of the second part; and Pioneer Trust Company, a corporation of the State of Missouri (hereinafter called the Trustee, which expression wherever herein used shall include any successor or successors to said Trustee in the trust hereby created), party of the third part; and Kansas City Terminal Railway Company (hereinafter referred to as the "Terminal Company"), a corporation of the State of Missouri, party of the fourth part, witnesseth:

Whereas, the parties of the first, third and fourth parts have heretofore, on the 12th day of June, 1909, entered [fol. 164] into a certain agreement (to which this contract is supplemental), relating to the stock of the Terminal Company, which agreement is hereinafter referred to as the "Stock Trust Agreement"; and

Whereas, the New Companies severally desire to be admitted to the joint use of the Union Passenger Station and all the Terminal Facilities referred to in the Operating Agreement, designated as "Exhibit B" in the Stock Trust Agreement, and to that end have concurrently with the execution of this instrument executed the First Supplemental Operating Agreement, a contract supplemental to said "Exhibit B," and it is now desired by the parties hereto that the New Companies shall severally subscribe to the capital stock of the Terminal Company and deposit such stock with the Trustee under the terms and conditions of the Stock Trust Agreement in the same manner and with like effect as though the New Companies had been parties thereto originally;

Now, Therefore, the parties hereto do mutually covenant and agree each with the other as follows:

First. Each of the New Companies hereby agrees to subscribe for one thousand (1,000) shares of the capital stock of the Terminal Company, each of said shares being in the sum of One Hundred Dollars ($100.00) par value, so that

the aggregate amount par value subscribed by each of the New Companies shall be One Hunderd Thousand Dollars ($100,000.00); and each of the New Companies agrees to pay for said stock in cash at par to the Terminal Company, as and when the same shall be called for by the President of the Terminal Company, together with interest at the rate of five per cent. per annum upon the average amounts paid from time to time by the Old Companies, respectively, upon their subscriptions to the captial stock of the Terminal Company, computed from the average dates of said payments to the date when payments for said capital stock is made by the New Companies, respectively: [fol. 165] and the Terminal Company agrees to execute and deliver to the New Companies respectively its capital stock, as aforesaid, upon payment therefor being duly made as above provided. Each of the New Companies agrees forthwith to deliver to the Trustee the certificates for nine hundred and ninety-five (995) shares of the capital stock of the Terminal Company upon the terms and conditions named in the Stock Trust Agreement to the same extent and with like effect as though the New Companies and each of them had been parties to the Stock Trust Agreement originally.

Second. The number of directors of the Terminal Company shall be increased from eleven (11) to thirteen (13), so that each of the New Companies can have a representative upon the Board of Directors.

Third. Each of the New Companies assumes all of the obligations of the Stock Trust Agreement and agrees to be bound by the terms and conditions thereof with like force and effect as if they had executed the same originally as a party thereto; and the Old Companies, the Trustee and the Terminal Company do hereby reaffirm their covenants and agreements in the Stock Trust Agreement contained, and reacknowledge the terms and conditions thereof—it being hereby declared to be the intention of the parties hereto and the purpose in the execution of this agreement that the New Companies shall be and do hereby become parties to the Stock Trust Agreement with like force and effect as if they had executed the same originally.

Fourth. The covenants and agreements hereof made by the parties of the first and second parts are several and not joint.

In witness whereof, each of the parties hereto has caused these presents to be signed by its President or one of its Vice-Presidents, and its corporate seal to be hereunto affixed, and attested by its Secretary or an Assistant Secretary the day and year first above written.

[fol. 166] The Atchison, Topeka and Santa Fe Railway Company, by J. W. Kendric., Its Vice-President. (Seal.)

Attest: Edward McBride, Asst. Secretary.

Chicago, Milwaukee and St. Paul Railway Company, by A. J. Earling, Its President. (Seal.)

Attest: E. W. Adams, Secretary.

The Chicago, Rock Island and Pacific Railway Company, by H. U. Mudge, Its President. (Seal.)

Attest: George H. Crosby Secretary.

St. Louis and San Francisco Railroad Company, by B. L. Winchell, Its President. (Seal.)

Attest: F. H. Hamilton, Secretary.

Union Pacific Company, by R. S. Lovett, Its President. (Seal.)

Attest: Alex Millar, Secretary.

[fol. 167] The Chicago and Alton Railroad Company, by George H. Ross, Its Vice-President. (Seal.)

Attest: H. E. R. Wood, Asst. Secretary.

The Wabash Railroad Company, by F. A. Delano, Its President. (Seal.)

Attest: E. P. Pryor, Asst. Secretary.

Missouri, Kansas and Texas Railway Company, by A. A. Allen, Its President. (Seal.)

Attest: C. N. Whitehead, Secretary.

The Missouri Pacific Railway Company, by C. S. Clarke, Its Vice-President. (Seal.)

Attest: F. W. Irland, Asst. Secretary.

Chicago, Burlington and Quincy Railroad Company, by D. Miller, Its President. (Seal.)

Attest: H. W. Weiss, Asst. Secretary.

[fol. 168] The Kansas City Southern Railway Company, by J. A. Edson, Its President. (Seal.)

Attest: R. J. McCarty, Asst. Secretary.

Chicago, Great Western Railroad Company, by S. M. Felton, Its President. (Seal.)

Attest: J. F. Coykendall, Secretary.

Pioneer Trust Company, as Trustee, by Walton H. Holmes, Its President. (Seal.)

Attest: B. H. McGarvey, Secretary.

Kansas City Terminal Railway Company, by H. L. Harmon, Its President. (Seal.)

Attest: C. C. Ripley, Secretary.

[fol. 169] State of Illinois,
County of Cook, ss:

On this 30th day of March, in the year 1910, before me appeared J. W. Kendrick, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the Vice-President of The Atchison, Topeka and Santa Fe Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said J. W. Kendrick acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Agnes K. Donohue, Notary Public, Cook County, Illinois. My commission expires on the 22d day of May, 1911. (Seal.)

[fol. 170] STATE OF ILLINOIS,
County of Cook, ss:

On this 29th day of April, in the year 1910, before me appeared A. J. Earling, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of Chicago, Milwaukee and St. Paul Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said A. J. Earling acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

W. D. Millard, Notary Public, Cook County, Illinois.
My commission expires on the 11th day of May, 1912. (Seal.)

[fol. 171] STATE OF ILLINOIS,
County of Cook, ss:

On this 26th day of April, in the year 1910, before me appeared H. U. Mudge, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of The Chicago, Rock Island and Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said H. U. Mudge acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

C. Nyquist, Notary Public, Cook County, Illinois.
My commission expires on the 5th day of August, 1911. (Seal.)

[fol. 172] STATE OF MISSOURI,
City of St. Louis, ss:

On this 17th day of May, in the year 1910, before me appeared B. L. Winchell, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of St. Louis and San Francisco Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said B. L. Winchell acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Kate L. Worley, Notary Public, City of St. Louis, Missouri. My commission expires on the 22nd day of November, 1911. (Seal.)

[fol. 173] STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of June, in the year 1910, before me appeared R. S. Lovett, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of New York, in the State of New York; that he is the President of Union Pacific Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said R. S. Lovett acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

L. Elwell, Notary Public, New York County, New York. My commission expires on the 30th day of March, 1911. (Seal.)

[fol. 174] STATE OF ILLINOIS,
County of Cook, ss:

On this 19 day of April, in the year 1910, before me appeared George H. Ross, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is Vice-President of The Chicago and Alton Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said George H. Ross acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Robt. J. Bell, Notary Public, Cook County, Illinois. My commission expires on the 23rd day of February, 1911. (Seal.)

[fol. 175] STATE OF ILLINOIS,
County of Cook, ss:

On this 29th day of April, in the year 1910, before me appeared F. A. Delano, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of The Wabash Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said F. A. Delano acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

John De LaMater, Notary Public, Cook County, Illinois. My commission expires on the 12th day of August, 1913. (Seal.)

[fol. 176] STATE OF MISSOURI,
City of St. Louis, ss:

On this 5th day of May, in the year 1910, before me appeared A. A. Allen, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Dallas, in the State of Texas; that he is the President of Missouri, Kansas and Texas Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said A. A. Allen acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Claude O. Pearcy, Notary Public, City of St. Louis, Missouri. My commission expires on the 17th day of December, 1910. (Seal.)

[fol. 177] STATE OF MISSOURI,
City of St. Louis, ss:

On this 30 day of April, in the year 1910, before me appeared C. S. Clarke, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of St. Louis, in the State of Missouri; that he is the Vice-President of The Missouri Pacific Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said C. S. Clarke acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

George C. Donovan, Notary Public, City of St. Louis, Missouri. My commission expires on the 9th day of November, 1911. (Seal.)

[fol. 178] STATE OF ILLINOIS,
County of Cook, ss:

On this 28th day of April, in the year 1910, before me appeared D. Miller, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of the Chicago, Burlington and Quincy Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said D. Miller acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

J. H. Pettibone, Notary Public, Cook County, Illinois. My commission expires on the third day of March, 1914. (Seal.)

[fol. 179] STATE OF MISSOURI,
County of Jackson, ss:

On this 4th day of March, in the year 1910, before me appeared J. A. Edson, to me personally known, who being by me duly sworn, did depose and say that he resides in the City of Kansas City, in the State of Missouri; that he is the President of The Kansas City Southern Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said J. A. Edson acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Clarence R. Hall, Notary Public, Jackson County, Missouri. My commission expires on the 15th day of October, 1912. (Seal.)

[fol. 180] STATE OF ILLINOIS,
County of Cook, ss:

On this 24" day of February, in the year 1910, before me appeared S. M. Felton, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Chicago, in the State of Illinois; that he is the President of the Chicago Great Western Railroad Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said S. M. Felton acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Charles G. Lavery, Notary Public, Cook County, Illinois. My commission expires on the 5" day of November, 1913. (Seal.)

[fol. 181] COUNTY OF JACKSON,
State of Missouri, ss:

On this 12th day of August, in the year 1910, before me appeared Walton H. Holmes, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Kansas City, in the State of Missouri; that he is the President of Pioneer Trust Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said Walton H. Holmes acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

John J. O'Keefe, Notary Public, Jackson County, Mo. My commission expires on the eighth day of June, 1914. (Seal.)

[fol. 182] STATE OF MISSOURI,
County of Jackson, ss:

On this 3rd day of March, in the year 1910, before me appeared Horatio L. Harmon, to me personally known, who, being by me duly sworn, did depose and say that he resides in the City of Kansas City, in the State of Missouri; that he is the President of Kansas City Terminal Railway Company, one of the corporations described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that said instrument was signed and sealed in behalf of said corporation by order of its Board of Directors, and that he signed his name thereto by like order; and said Horatio L. Harmon acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Grace L. Forbes, Notary Public, Jackson County, Missouri. My commission expires on the 2nd day of May, 1912. (Seal.)

[fol. 183] Removal of Trustee and Appointment of Successor Trustee in Stock Trust Agreement Relating to Stock of Kansas City Terminal Railway Company

[fol. 184] Whereas, Pioneer Trust Company, a corporation, Trustee in a certain Stock Trust Agreement between ten Railway Companies, parties of the first part, said Pioneer Trust Company, party of the second part, and Kansas City Terminal Railway Company, party of the third part, relating to stock of the Kansas City Terminal Railway Company, dated June 12, 1909, as amended by First Supplemental Stock Trust Agreement between the said ten Railway Companies, parties of the first part, The Kansas City Southern Railway Company and Chicago Great Western Railroad Company, parties of the second part, Pioneer Trust Company, party of the third part, and Kansas City Terminal Railway Company, party of the fourth part, dated January 24, 1910, was on the 24th day of January, 1933, closed by order of its Board of Directors and was on said date taken in charge by the Finance Commissioner of the State of Missouri, and by

reason thereof a vacancy exists in the trusteeship created by said Stock Trust Agreement as so amended; and

Whereas, in order that there may be no question as to the existence of such vacancy, it is desirable that formal action be taken to remove Pioneer Trust Company from said trusteeship; and

Whereas, it is necessary that a new trustee be appointed;

Now, therefore, a majority of the Railway Companies, parties to said Stock Trust Agreement as so amended [fol. 185] (none of said majority being in default) by this instrument do hereby—

(1) Remove said Pioneer Trust Company from the trusteeship created by said Stock Trust Agreement as so amended; and

(2) Appoint The First National Bank of Kansas City, a corporation duly organized and existing under the laws of United States, a new trustee, or successor trustee, under said Stock Trust Agreement as so amended and in the trusteeship created by said Stock Trust Agreement, as so amended, with all the authority, rights, powers and duties given to the Trustee by said Stock Trust Agreement, as so amended.

This instrument is executed in several counterparts, each an original, by a majority of the Railway Companies not in default, parties to said Stock Trust Agreement as so amended. Said counterparts so executed shall have the same effect as if the signatures of the Railway Companies were attached to a single instrument.

In witness whereof, said Railway Companies have executed this instrument by their duly authorized officers as of the 1st day of March, 1933.

Union Pacific Railroad Company, by W. M. Jeffers, Executive Vice-President. (Seal.)

Attest: C. B. Matthai, Asst. Secretary.

[fol. 186] Missouri Pacific Railroad Company, by E. M. Durham, Jr., Senior Vice-President. (Seal.)

Attest: A. T. Cole, Assistant Secretary.

St. Louis-San Francisco Railway Company, by R. V. Hart, Vice-President. (Seal.)

Attest: L. O. Williams, Secretary.

The Atchison, Topeka and Santa Fe Railway Company, by W. B. Storey, President. (Seal.)

Attest: R. D. Brown, Acting Asst. Secretary.

The Kansas City Southern Railway Co., by C. E. Johnston, President. (Seal.)

Attest: L. J. Hensley, Asst. Secretary.

[fol. 187] Chicago Great Western Railroad Company, by P. H. Joyce, President. (Seal.)

Attest: W. G. Lerch, Secretary.

The Chicago, Rock Island & Pacific Railway Co., by J. E. Gorman, President.

Attest: Carl Nyquist, Secretary.

Chicago, Burlington & Quincy Railroad Co., by Ralph Budd, President. (Seal.)

Attest C. I. Sturgis, Secretary.

Wabash Railway Company, by Walter S. Franklin, President. (Seal.)

Attest: W. F. Bender, Assistant Secretary.

[fol. 188] State of Nebraska,
County of Douglas, ss:

On this 9th day of March, 1933, before me appeared W. M. Jeffers, to me personally known, who being by me duly sworn, did say that he is the executive Vice-President of Union Pacific Railroad Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said W. M. Jeffers acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Omaha, Nebraska, the day and year first above written.

Louis Scholnick, Notary Public within and for said County and State. My commission expires May 9, 1936. (Seal.)

[fol. 189] STATE OF MISSOURI,
City of St. Louis, ss:

On this 8th day of March, 1933, before me appeared E. M. Durham, Jr., to me personally known, who being by me duly sworn, did say that he is the Senior Vice-President of Missouri Pacific Railroad Company, a corporation, and that the seal afixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said E. M. Durham, Jr., acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in St. Louis, Mo., the day and year first above written.

W. Jenkins, Notary Public within and for said City and State. My commission expires Feby. 27, 1935. (Seal.)

[fol. 190] STATE OF MISSOURI,
City of St. Louis, ss:

On this 8th day of March, 1933, before me appeared R. V. Hart, to me personally known, who being by me duly sworn, did say that he is the Vice-President of St. Louis-San Francisco Railway Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said R. V. Hart acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in St. Louis the day and year first above written.

Walter Studt, Notary Public within and for said City and State. My commission expires Nov. 11, 1936. (Seal.)

[fol. 191] STATE OF ILLINOIS,
County of Cook, ss:

On this 4th day of March, 1933, before me appeared W. B. Storey, to me personally known, who being by me duly sworn, did say that he is the President of The [illegible]chi-

son, Topeka and Santa Fe Railway Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said W. B. Storey acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Chicago, Illinois, the day and year first above written.

Rudolph G. Rydin, Notary Public within and for said County and State. My commission expires Sept. 19, 1934. (Seal.)

[fol. 192] STATE OF MISSOURI,
County of Jackson, ss:

On this 28th day of Feb'y, 1933, before me appeared C. E. Johnston, to me personally known, who being by me duly sworn, did say that he is the President of The Kansas City Southern Railway Co., a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said C. E. Johnston acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Kansas City, Mo., the day and year first above written.

Carl L. Soderstrom, Notary Public within and for said County and State. My commission expires June 24, 1935. (Seal.)

[fol. 193] STATE OF ILLINOIS,
County of Cook, ss:

On this 1 day of March, 1933, before me appeared P. H. Joyce, to me personally known, who being by me duly sworn, did say that he is the President of Chicago Great Western Railroad Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was

signed and sealed in behalf of said corporation by authority of its Board of Directors, and said P. H. Joyce acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Chicago, Ill., the day and year first above written.

Leonard A. Ross, Notary Public within and for said County and State. My commission expires March 24th, 1936. (Seal.)

[fol. 194] STATE OF ILLINOIS,
County of Cook, ss:

On this 1st day of March, 1933, before me appeared J. E. Gorman, to me personally known, who being by me duly sworn, did say that he is the President of The Chicago, Rock Island & Pacific Railway Co., a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said J. E. Gorman acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Chicago, Illinois, the day and year first above written.

W. Vanderpool, Notary Public within and for said County and State. My commission expires Oct. 27, 1934. (Seal.)

[fol. 195] STATE OF ILLINOIS,
County of Cook, ss:

On this 1st day of March, 1933, before me appeared Ralph Budd, to me personally known, who being by me duly sworn, did say that he is the President of Chicago, Burlington & Quincy Railroad Co., a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Ralph Budd acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in Chicago, Illinois, the day and year first above written.

A. D. McLane, Notary Public within and for said County and State. My commission expires Mar. 22, 1935. (Seal.)

[fol. 196] State of Missouri,
City of St. Louis, ss:

On this 27th day of February, 1933, before me appeared Walter S. Franklin, to me personally known, who being by me duly sworn, did say that he is the President of Wabash Railway Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Walter S. Franklin acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my notarial seal at my office in St. Louis, Missouri, the day and year first above written.

Lillian F. Bonville, Notary Public within and for said City and State. My commission expires July 8, 1936. (Seal.)

[fol. 197] Decree of the Circuit Court of Jackson County, Missouri

[fol. 198] Be it remembered that on the 33rd day of the regular March Term, 1933, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 19th day of April, 1933, the following proceedings were had and made of record before Hon. A. Stanford Lyon, Judge of Division No. One in the cause entitled:

In the Circuit Court of Jackson County, Missouri, at Kansas City

No. 420,851

Kansas City Terminal Railway Company, a Corporation; The Atchison, Topeka and Santa Fe Railway Company,

a Corporation, and The Kansas City Southern Railway Company, a Corporation, Plaintiffs,

vs.

Pioneer Trust Company, O. H. Moberly, State Finance Commissioner, and Cornelius Roach, Deputy Finance Commissioner in Charge of Pioneer Trust Company, a Corporation, Defendants

Now on this day the petition of Kansas City Terminal Railway Company, The Atchison, Topeka and Santa Fe Railway Company and The Kansas City Southern Railway Company on behalf of themselves and others similarly situated coming on to be heard, Pioneer Trust Company, the State Finance Commissioner and the Deputy Finance Commissioner in charge having entered their respective appearances herein, and the evidence having been heard and the Court being fully advised in the premises, the Court finds the facts to be as alleged in said petition of Kansas City Terminal Railway Company, The Atchison, Topeka and Santa Fe Railway Company and The Kansas City Southern Railway Company, and that The First National Bank of Kansas City, with its principal place of business in Kansas City, Missouri, has been duly appointed successor trustee under the Stock Trust Agreement and Supplemental Stock Trust Agreement referred to in said petition, and is now the duly qualified successor trustee under said Stock [fol. 199] Trust Agreement and Supplemental Stock Trust Agreement, and that said petitioners are entitled to the relief therein prayed;

It is, therefore, by the court ordered, adjudged and decreed that the State Finance Commissioner or Cornelius Roach, Deputy Finance Commissioner in charge, shall deliver forthwith to The First National Bank of Kansas City as trustee under said Stock Trust Agreement and Supplemental Stock Trust Agreement all shares of stock and all certificates representing the same, which were in the possession of Pioneer Trust Company at the time the State Finance Commissioner took charge of Pioneer Trust Company, and shall execute in the name of Pioneer Trust Company by Cornelius Roach, Deputy Finance Commissioner in charge, all stock powers or assignments appearing on the back of such certificates of stock, duly assigning, transferring and delivering the same to The First National Bank

of Kansas City, Trustee under Stock Trust Agreement, dated June 12th, 1909, and Supplemental Stock Trust Agreement, dated January 24th, 1910, relating to stock of the Kansas City Terminal Railway Company, and shall also assign, transfer and deliver to said The First National Bank of Kansas City as trustee, all moneys, shares of stock, rights, contracts, choses in action, evidences of indebtedness and all other matters or things held by Pioneer Trust Company as trustee under said Stock Trust Agreement and Supplemental Stock Trust Agreement at the time Pioner Trust Company was taken in charge by the State Finance Commissioner, or which may have come into its hands or into the hands of the State Finance Commissioner since said time by reason of or relating to said Stock Trust Agreement or Supplemental Stock Trust Agreement, and that Pioneer Trust Company shall also execute, assign, transfer and deliver to The First National Bank of Kansas City as Trustee all stock powers or assignments appearing on the back of such certificates of stock, duly assigning, trans-
[fol. 200] ferring and delivering the same to The First National Bank of Kansas City as Trustee.

Entered April 19, 1933, in Division No. One by Judge Stanford Lyon.

State of Missouri,
County of Jackson, ss:

I, Lynn G. Buford, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the above and foregoing is a true and complete copy of the order as the same appears of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at office in Kansas City, this 13th day of May, 1933.

Lynn G. Buford, Clerk, by L. L. Scannell, Deputy Clerk. (Seal.)

[fol. 201] In Supreme Court of District of Columbia

Rule to Show Cause—Filed May 31, 1933

* * * * * * *

Upon the annexed application of Chicago Great Western Railroad Company and The Kansas City Southern Railway

Company, verified by P. H. Joyce, on the 29th day of May, 1933, it is

Ordered that the above-named respondent, Interstate Commerce Commission, show cause at a session of this court to be held in the courthouse of the Supreme Court of the District of Columbia, in the City of Washington, on the 7th day of June, 1933, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why the prayers of said application for a writ of mandamus should not be granted.

Sufficient reason appearing therefor, let service of this order, and the papers upon which it is granted, on the respondent on or before the 5th day of June, 1933, be deemed sufficient.

Dated Washington, May 31, 1933.

James M. Proctor, Justice of the Supreme Court of the District of Columbia.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed June 7, 1933

* * * * * * *

The Interstate Commerce Commission, respondent in the above-entitled cause, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the relators' petition contained, for answer thereto or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, and as and for a return to the rule to show cause herein issued, answers and says:

[fol. 202] I. Answering paragraphs (1) to (4), inclusive, of the petition, the Commission admits that the relators, Chicago, Great Western Railroad Company and The Kansas City Southern Railway Company are common carriers of persons and property subject to the provisions of the Interstate Commerce Act; admits that each of said relators owns and operates a line of railroad to Kansas City, Mo., which connects there with the railroad of the Kansas City

Terminal Railway Company, hereinafter called the Terminal Company; admits that said Terminal Company owns and operates a union station and other terminal facilities in Kansas City, Mo., and Kansas City, Kans.

II. Answering paragraph (5) of the petition, the Commission admits that on June 12, 1909, a stock trust agreement was entered into between the ten railroad companies (therein termed the Proprietary Companies), which were the then owners in equal parts of all the capital stock of the Terminal Company, as parties of the first part, the Pioneer Trust Company of Kansas City, Mo., as party of the second part, and the Terminal Company, as party of the third part. In answer to the allegations which purport to state the provisions of said stock trust agreement, the Commission alleges that said agreement is the best evidence of its contents and, if said allegations are deemed material, demands that they be proved.

III. Answering paragraph (6) of the petition, the Commission admits and alleges that on June 12, 1909, an operating agreement was entered into between the Terminal Company, the ten (10) Proprietary Companies and the Illinois Trust & Savings Bank, as trustee, containing mutual covenants relating to the construction, maintenance, use, operation and management of the above-mentioned union station and terminal facilities of the Terminal Company; admits and alleges that on January 24, 1910, a supplemental agreement was entered into between the Terminal Company, the relators herein, the ten Proprietary Companies and the Illinois Trust & Savings Bank as trustee, whereby all the provisions of said operating agreement of June 12, 1909, were extended to and made effective as to the relators herein; admits that true copies of said operating agreement and of said supplemental agreement are attached to the petition as Exhibit 1 thereof; and respectfully refers the Court to said copies for full informa-
[fol. 203] tion as to the provisions of said agreements.

IV. Answering paragraph (7) of the petition, the Commission admits that the Terminal Company issued and sold a large amount of its 4 per cent bonds, but disclaims information sufficient to form a belief as to the truth of the allegation that the amount thereof issued and sold was $50,000,000, and if said allegation be deemed material, it

demands proof thereof. Further answering said paragraph, the Commission admits the allegation as to the construction of the union station and other terminal facilities, and as to the use thereof by the relators and others.

V. Answering paragraphs (8) to (18), inclusive, of the petition, the Commission admits that on March 10, 1924, the Missouri-Kansas-Texas Railroad Company (hereinafter called the M-K-T), purchaser at judicial sale of most of the railway properties of Missouri, Kansas & Texas Railway Company, one of the Proprietary Companies, filed with the Commission a petition for an order under the provisions of section 3 (4) of the Interstate Commerce Act, according it the right to use designated portions of the passenger station and other terminal facilities of the Terminal Company; admits that said the M-K-T, in exercise of a right conferred upon it by decree entered in receivership proceedings involving its predecessor company, had theretofore elected not to adopt the operating agreement of June 12, 1909, to which its predecessor had been a party; admits that said petition of the M-K-T alleged that the terms imposed by said operating agreement for the use by the M-K-T of said station and terminal facilities were unjust and burdensome in that it required each of the Proprietary Companies to pay one twelfth of the Terminal Company's taxes and interest on bonded debt without regard to the use of the terminals made by each said company and that the Commission was therein asked to prescribe, upon a user basis, the terms upon which the M-K-T should thereafter be permitted to use said portions of the station and other terminal facilities; admits that, pending hearing and decision upon said petition, the Commission, by its Service Order No. 40, entered under section 1 (15) of the Interstate Commerce Act, ordered the Terminal Company to permit the M-K-T to use said facilities upon the terms and provisions of the operating agreement; [fol. 204] payments in accordance therewith, however, not to be the final measure of compensation for the effective period of the order, but the total compensation for said period to be upon such terms as might be agreed to by the carriers, or failing such agreement, as the Commission might, after subsequent hearing, find to be just and reasonable; admits that the proceeding so instituted by the petition of the M-K-T was designated by the Commission as its

Docket No. 15682, Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company; admits that the petitions of intervention referred to in paragraph (10) of the petition herein, copies whereof are attached to said petition, marked Exhibits 3 and 4, were filed in said Commission proceeding by the relators herein and were allowed by the Commission; admits that petitions of intervention were also filed by the other Proprietary Companies, certain of which were filed in opposition to the petition of the M-K-T and others of which were filed to obtain the same relief as to terms of use of the terminal facilities as was sought by the M-K-T; and alleges that the Terminal Company, respondent in said proceeding, filed a plea to the Commission's jurisdiction in the premises and a motion to dismiss, together with an answer on the merits.

Further answering said paragraphs (8) to (18), inclusive, of the petition, the Commission admits and alleges that in said proceeding No. 15682, Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company, it made, issued and served upon the parties thereto, including the relators, its report and order of November 10, 1925 (104 I. C. C. 203), whereby it dismissed the above mentioned petitions of intervention, including those of the relators herein, but retained jurisdiction over the petition of the M-K-T, awaiting decision of a cause pending in the federal courts which involved the issue as to whether the receivership court had erred in confirming the sale to the M-K-T of the properties of the former Missouri, Kansas and Texas Railway Company without imposing the condition that the purchaser assume the undertakings of a proprietary company under the operating agreement of June 12, 1909; admits and alleges that true copies of its said report and order of November 10, 1925 are attached to the petition herein, marked Exhibit 5; and the Commission hereby incorporates the same by reference as a part of this [fol. 205] its answer to said petition, and respectfully refers the Court thereto for a description of the proceeding before the Commission and the issues therein raised, and for full, complete and accurate information as to its statements, findings and conclusions in the premises. Further answering said paragraphs, the Commission alleges that prior to the making and entering of its said report and order, all the parties thereto, including the relators herein,

were accorded the full hearing provided for by the Interstate Commerce Act; that in said hearing a large volume of testimony was taken and other evidence bearing upon the matters covered in said report and order was submitted to the Commission for consideration on behalf of the various parties thereto, including the relators; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of the parties by their respective counsel, including the particular questions raised by relators in this suit, whereupon the Commission determined said matters and made and entered its said report and order; that said report and order included the Commission's findings of fact, decision, conclusions and order in the premises, and that upon the evidence aforesaid, and as shown in and by its report, the Commission made the findings and stated the conclusions upon which the order is based.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid; that in making said report and order it considered and weighed carefully in the light of its own knowledge and experience each fact, circumstance and condition called to its attention on behalf of relators, including all material matters covered by the allegations of the petition herein; that said order of November 10, 1925, was not made or issued either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it; and that in making said order the Commission did not exceed the authority which had been duly and lawfully conferred upon it.

Further answering paragraph (8) of the petition: In answer to the allegations thereof which purport to set forth or construe undertakings of the relators and the Proprie- [fol. 206] tary Companies under their said agreements of June 12, 1909 and January 24, 1910, the Commission respectfully refers the Court to the copies of said agreements, shown as Exhibit 1 to the petition, for full and correct information in the premises; in answer to the allegations thereof which purport to show facts, circumstances and conditions subsequent to the making of its report and

order of November 10, 1925, the Commission disclaims information sufficient to form a belief as to the truth of said allegations and, if deemed material, demands that they be proved.

Further answering paragraph (13) of the petition, the Commission admits the pendency before it of said proceeding in Docket No. 15682 in so far as it concerns the application of the M-K-T; admits the filing by the relators herein of petitions for rehearing of the Commission's order of November 10, 1925, dismissing relators' intervening petitions and the denial by the Commission of said petitions for rehearing; admits that the relators and the other proprietary companies are using the terminal facilities of the Terminal Company. The Commission disclaims information sufficient to form a belief as to whether the use made of said terminal facilities is the same as prior to November 10, 1925, and therefore neither admits nor denies that it is.

Further answering paragraphs (14) and (15) of the petition, the Commission avers that the allegations therein contained consist of assumptions and conclusions based upon surmise as to results which it is supposed may result from future developments, and that they are, therefore, speculative, immaterial, irrelevant and incompetent and require no answer.

Further answering paragraphs (16) and (17) of the petition, the Commission denies that its action in dismissing by its order of November 10, 1925, the intervening petitions of relators was erroneous in law for the reasons set forth in said paragraphs or otherwise; and denies that such action was either contrary to law, or arbitrary, or deprived relators of rights to which they are entitled under the law.

Further answering paragraph (18) of the petition, the Commission alleges that it did consider and determine upon the merits the asserted violation of paragraphs (1) and (3) of Section 3 of the Interstate Commerce Act, and found that upon the evidence adduced, no violation of said section was shown or established, which finding and con-
[fol. 207] clusion of the Commission in the exercise of its validly conferred jurisdiction cannot be reviewed in a proceeding in mandamus. In answer to the allegation that the relators have no adequate judicial remedy other than by a petition for mandamus, the Commission avers that said allegation is a conclusion of law to which it is not required to make answer.

X. For a further answer to the petition, the Commission alleges that as shown by the petition herein, the relators voluntarily entered into the several agreements referred to covering the use and occupation of the terminal facilities of the Terminal Company; that the terms and conditions of said agreements and the obligations imposed thereby were known and fully understood by the relators at the time they became parties thereto; that the said relators sought in the proceeding before the Commission, and are now seeking, to be relieved of the terms, conditions and obligations of said agreements assumed by them voluntarily and without coercion; that paragraph (4) of section 3 does not confer upon the Commission the power to grant the relief which was sought by the relators.

Except as herein expressly admitted, the Commission denies the truth of each and all of the allegations contained in the petition, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and order of November 10, 1930.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that the rule to show cause be discharged and that the petition be dismissed.

Interstate Commerce Commission, by H. L. Underwood, Attorney. Daniel W. Knowlton, Chief Counsel, of Counsel.

Duly sworn to by Frank McManamy. Jurat omitted in printing.

[fol. 208] In Supreme Court of District of Columbia

Petition of the Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company for Leave to Intervene as Respondents—Filed June 20, 1933.

* * * * * * *

Come now The Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway

Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company, railroad corporations organized and existing according to law and having their principal places of business in the cities of Topeka, Kans., Chicago, Ill., Omaha, Neb., and Chicago, Ill., respectively, and petition the Court for leave to intervene in the above-entitled and numbered cause as parties respondent and with leave to plead in said cause and participate therein in all respects and to the same extent as though they had been made parties respondent herein in the first instance.

As grounds for this petition, petitioners show:

First. That these petitioners are among the railroad corporations referred to in Paragraph (5) of relators' petition and in Exhibit 2 attached to said petition.

Second. That the petition of the relators in this cause shows on its face that the rights of your petitioners will be vitally affected by any order or orders which may be entered by this Court herein.

Third. That the facts, in so far as they are relevant, upon which the relators reply, as alleged in their petition for writ of mandamus, except in so far as relators plead conclusions of law, are not in dispute.

[fol. 209] Fourth. That if petitioners are permitted to intervene herein as parties respondent, the legal questions involved can be determined in this cause as between the relators and petitioners, thereby avoiding further expensive litigation between the same parties upon the same subject matter.

Fifth. Petitioners state upon information and belief that neither the relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, nor the respondent, Interstate Commerce Commission, do or will interpose objection to these petitioners becoming parties to this action with all the rights of a respondent herein.

Wherefore, the premises considered, petitioners, The Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company, pray an order of this Court

permitting them to intervene in this cause as parties respondent.

Respectfully submitted, Charles H. Woods, E. A. Boyd, 1211 Railway Exchange, Chicago, Ill.; Bruce Scott, Walter McFarland, 547 W. Jackson Blvd., Chicago, Ill.; W. F. Dickinson, W. A. Peters, La Salle Street Station, Chicago, Ill.; J. M. Souby, 1416 Dodge Street, Omaha, Neb., Attorneys for Petitioners. Lawrence H. Cake, 1040 Washington Bldg., Washington, D. C., Attorney for Petitioners.

[fol. 210] In Supreme Court of District of Columbia

Order Granting Leave to Intervene—June 13, 1933

Upon consideration of the petition filed herein by the Atchison, Topeka and Santa Fe Railway Company; the Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company for leave to intervene as respondents, it is ordered that said motion be, and the same is hereby granted.

In Supreme Court of District of Columbia

Answer of the Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company, Interveners, to the Petition of the Relators—Filed June 20, 1933

* * * * * * *

Come now The Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Chicago, Burlington & Quincy Railroad Company, as interveners, by leave of court and for answer to the petitions of the relators—Chicago Great Western Railroad Company and

The Kansas City Southern Railway Company—and in response to the rule to show cause, duly made and entered on the thirty-first day of May, 1933, allege:

First. Interveners admit as true the allegations contained in Paragraph (1) of relators' petition.

Second. Interveners admit as true the allegations contained in Paragraph (2) of relators' petition.

Further answering Paragraph (2) of relators' petition, interveners say that the lines of railroad of relators connect at Kansas City, Mo., with the railroads of the various proprietary companies entering Kansas City, Mo., through the convenient provision for the organization of joint terminal facilities by the corporate control of the Kansas City Terminal Railway Company. The Kansas City Terminal Railway Company was organized not for the purpose of engaging in transportation by railroad of persons and property in interstate commerce. The organization of that company was merely a convenient method of avoiding the necessity of all railroads entering Kansas City for providing their own terminal facilities. The stock ownership of [fol. 211] the terminal company's stock by the proprietary companies was simply a convenient method of providing joint terminal facilities for the common carrier railroads.

Third. Interveners admit as true the allegations contained in Paragraph (3) of relators' petition.

Fourth. Interveners admit as true the allegations contained in Paragraph (4) of relators' petition.

Further answering Paragraph (4) of relators' petition, interveners deny that the terminal company is a common carrier engaged in the transportation of persons and property in interstate commerce in the sense in which relators make the allegation. The terminal company is simply a terminal corporation for the convenience of the proprietary common carriers in connection with the interchange of freight and passengers at Kansas City, Mo. It is a terminal and switching line. The terminal company issues no bills of lading for its own account. In receiving and delivering to a line haul carrier for transportation of any goods or merchandise, it merely acts as the agent of such line haul carrier and assumes no obligations other than that of a switching line.

Fifth. Interveners admit as true the allegations contained in Paragraph (5) of relators' petition.

Sixth. Interveners admit as true the allegations contained in Paragraph (6) of relators' petition.

Seventh. Interveners admit as true the allegations contained in Paragraph (7) of relators' petition.

Eighth. Interveners admit as true the following allegations in Paragraph (8) of relators' petition:

"Under Section 1 of Article II of the Operating Agreement, the Proprietary Companies, including relators, were required to pay, as the same became due, one-twelfth of all interest due upon the first mortgage bonds of the Terminal Company amounting to $50,000,000, one-twelfth of the principal of said bonds as and when the same became due and payable, and one-twelfth of the taxes, rates, benefits, assessments or other governmental charges of any kind made against the Terminal Company or its properties. Said Proprietary Companies, including relators, were also required to assume, in equal parts, any of the aforementioned amounts due from any one of them which might be in default or fail to make the payments required of it under [fol. 212] said Operating Agreement. The foregoing payments were required to be made without respect to the amount of use made of the Terminal Company's facilities by the Proprietary Companies, including relators."

Further answering Paragraph (8) of relators' petition, interveners allege that the matter of the distribution of the charges to the proprietary companies, as to those items in Article II of the operating agreement which are paid upon a user basis, are not quite so simple as alleged by the relators. The Court's attention is called to Section 6 of Article II of the operating agreement. It will be noted that under this section the terminal property is divided into a number of sections, or zones. A separate accounting as to operation, maintenance, renewal, repair, and other expenses of the terminal company is kept for each zone. The proprietary companies contribute toward the payment of these items only in proportion to their use of the facilities within the zone. If, during any month, any one of the proprietary companies makes no use *to* any particular zone, it participates in no payment of the items involved in connec-

tion with that zone. In a word, the payment of the items which are dealt with under a user basis varies from month to month and as between the different proprietary companies in each of the varying zones. Each and all of the proprietary companies have an equal right to use any one or all of the zones if it sees fit to exercise that right. No company participates in the maintenance and other items of expense in connection with any zone in any month in which it fails to make use thereof or to exercise its rights. The participation of each proprietary company in the maintenance expense is based entirely upon its proportionate use of a certain zone. There is therefore no fixed percentage which could be arrived at as a permanent factor upon which to base an appointment of the items which are payable on a user basis. The percentage of such items is entirely within the control and is at the election of the company which sees fit to make use of the facilities in any particular zone. Each company's use varies from month to month and in the same month as to any zone.

Further answering Paragraph (8) of relators' petition, interveners allege that each of the proprietary companies, including the relators, who are parties to the operating [fol. 213] agreement and the supplement thereto, designated by relators as Exhibit 1 to the petition, who are the owners of all of the stock of the terminal company, have the right under the terms of the contract to make such use of the terminal company's facilities as it elects to use. The contract grants no right to any proprietary company not fully granted to each and all of the other proprietary companies. The terms of the contract itself provide that such a right to use the terminal facilities shall be granted by the terminal company to all of the parties to the contract without discrimination. Certain of the proprietary companies have seen fit to exercise the right so granted by the operating agreement to a greater extent than other proprietary companies. Such greater use by certain of the proprietary companies has never at any time prevented the other proprietary companies, including the relators, from exercising their full rights to the fullest use of the terminal facilities when they elected to exercise such rights. There is and, in fact, has been no discrimination as to the use of such facilities by any of the proprietary companies. Neither the terminal company nor any of the proprietary companies have ever denied and are not now denying the

right of the relators to make the fullest possible use of the terminal facilities and to place themselves upon an equality with all other users if they so elect. The alleged discrimination does not in fact exist. What the relators term discrimination is not the creature of the operating agreement but, if it exists at all, it is the creature of the relators themselves in that they have failed to exercise to the full rights which have been granted to them under the operating agreement and which rights the relators voluntarily sought.

Further answering Paragraph (8) of relators' petition, interveners allege that the discrimination referred to in relators' petition—which discrimination is not admitted but is specifically denied—if it existed, is a result of the contract voluntarily entered into by the parties and is not such a discrimination as comes within the terms of the Interstate Commerce Act and with which the Interstate Commerce Commission would have jurisdiction to deal.

Interveners admit upon information and belief that the sums of money shown in Paragraph (8) of relator's peti- [fol. 214] tion and in Exhibit 2 to said petition are true and correct. Interveners allege, however, that said payments were made on the basis of the operating agreement entered into between each and all of the proprietary companies, including the relators, and were the only payments which could have been made in compliance with said agreement.

Further answering Paragraph (8), interveners allege that the gist of relators' petition lies in the fact that it is seeking to have this Court authorize and direct the Interstate Commerce Commission to take jurisdiction to determine as to whether or not the relators may remain proprietors of the terminal company through stock ownership, with all the rights and privileges growing out of that proprietorship, and at the same time permit them to avoid the terms of the contract under which they became such proprietors. Interveners allege that the Interstate Commerce Act and no other act of Congress has conferred jurisdiction upon the Interstate Commerce Commission to rewrite contracts of the parties, however improvidently made, under the terms of which contracts the parties became owners of property.

Ninth. Interveners admit as true the allegations in Paragraph (9) of relators' petition, but deny the relevancy thereof.

Further answering Paragraph (9) of relators' petition, interveners say that the legal status of the Missouri-Kansas-Texas Railroad Company in its use of the terminal facilities of the terminal company at Kansas City differs materially from that of the relators herein. The Missouri-Kansas-Texas Railroad Company had no proprietary rights, through stock ownership or otherwise, in said terminal property or its facilities. That company was and is entering upon the property and using the terminal facilities, ownership of which is in others. It has not now and never has had an ownership in the property or facilities. It was not a successor by assignment to the rights of any previous owner. It was not a party to the operating agreement. It entered the property and used the facilities upon a conditional sufferance. Pending further agreement between itself and the proprietary companies, the meeting of the conditions of user conferred no proprietary rights. Failure to meet the conditions would terminate the sufferance. Unless by process of condemnation or by some available legal remedy it should acquire a right of entry and [fol. 215] user, it would become, after failure to meet the conditions of entry and user, a mere trespasser upon the property of others.

The legal status of the relators is quite different. They enter the property and use the facilities not by sufferance but as joint and equal owners with the other ten owners of the terminal company stock. They became joint and equal owners of the terminal company stock with full knowledge of the fact that the property of the terminal company to which they are acquiring joint and equal stock ownership is encumbered by a deed of trust to secure the payment of bonds, the proceeds of which, together with the proceeds of the sale of stock, were used to acquire the property and to construct the facilities. Upon signing the operating agreement the relators acquired specific property and user rights equal to that of the other ten proprietary companies. They likewise assumed obligations equal to, no greater and no less than, the other ten companies. Among other obligations so assumed was that of a share and share alike contribution to the payment of the bonds and interest so as to remove the cloud upon the title to the terminal company property and a similar contribution to the payment of taxes and other levies, which, if unpaid, would jeopardize the

title. They have all the property rights and all of the user rights that are possessed by any proprietary company. If and when the encumbrance is removed, they will, as equal owners of the terminal company stock, share equally with all the other proprietors in the profits and losses which may accrue from the operation of the terminal property.

The failure to exercise these rights or the partial exercise of such rights is a matter of the relators' own election. With such election the Interstate Commerce Commission, this Court, and the other proprietary companies have no concern and over such election they have no control. There is no process of law, condemnation or otherwise, by which these rights now possessed can be enlarged. As common carriers, the relators can not acquire this property and these facilities for their service of the public as common carriers. They have already done that and the property is being so used by the relators.

The relators are seeking to have this Court hold that the Interstate Commerce Commission has jurisdiction to [fol. 216] abrogate a contract lawfully entered into and to rewrite that contract for the parties This, in spite of the fact that it was under the terms of such a contract that the parties acquired the title to the stock of the terminal company, the owner of the very property in question. There is a total absence of any allegation of fraud in the procurement of the contract and there is no charge of misrepresentation of facts, nor is there any other charge upon which a Court of Equity could order the abrogation or the modification of a contract. The Interstate Commerce Commission has not been given the powers and functions of a Court of Equity. Its functions are strictly limited and specifically defined by statute. The powers here sought by the relators are not conferred upon the Interstate Commerce Commission by any provision of law.

Further answering Paragraph (9) of relators' petition, the attention of the Court is called to the decision of the Supreme Court of the United States in the case of Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission of California, et al., 283 U. S. 380, 391, 392. This case involved the power of the Commission to require the carriers to construct a union station and joint facilities at Los Angeles, Calif. The Court held that the Interstate Com-

merce Commission had no such power or authority. Th
language of the Court is as follows:

" • • • In deciding that the Congress had given
the Interstate Commerce Commission no power to requi
the building of such a union terminal as that projected i
this case, this Court adverted to the extent of the authorit
that would be involved and the effect of its exercise upo
local interests. The Court said (280 U. S. pp. 68, 69):

'Such authority,, if conferred in Los Angeles, would hav
application to all interstate railroad junctions, includin
the numerous large cities of the country, with their res
dential, commercial, shopping, and municipal centers no
fixed and established with relation to existing terminals.
would become a statute of the widest effect and would ent
into the welfare of every part of the country. Various i
terests would be vitally affected by the substitution of
union station for the present terminals. A selection of i
site from the standpoint of a city might greatly affect pro
erty values and likewise local transportation systems. Th
[fol. 217] exercise of such power would compel the carrie
to abandon existing terminals, to acquire new land an
rights of way and enter upon new construction, to aba
don large tracts and to sell territory of the same exte
as no longer necessary for the use of the carriers.

'There would have to be tribunals to apportion the e
penditures and cost as between the carriers. A prop
statute would seem to require detailed directions, and w
should expect the intention to be manifested in plain ter
and not to have been left to be implied from varied regul
tory provisions of uncertain scope. It would be a mon
mental work and one requiring the most extensive exerci
of expert engineering and railroad construction. It wou
make possible great changes of much importance in th
plans of every city and in the rearrangement and mut
tions of railroad property and public and private busine
structures everywhere. We find no statutory preparati
for the organization of such machinery.' "

Certainly if the Interstate Commerce Commission,
decided by the Supreme Court, would be without power
compel the railroads entering Kansas City to construct
union station and joint facilities, then it certainly follow
that where the Kansas City railroads voluntarily organiz

a corporation for the purpose of constructing and maintaining a union station and joint facilities and voluntarily entered into a contract under the terms of which that corporation which they had created was to carry out the purpose and under the terms of which each of the constituent companies should participate, it certainly follows as a matter of logic that the Interstate Commerce Commission would have no power to do indirectly that which it is without power to do directly. The voluntary action of the carriers in connection with the union station at Kansas City could not have been compelled. It is certainly not within the power of the Commission, by compulsion, to require such carriers to change their relationship to the property so voluntarily created.

Tenth. Interveners admit as true the allegations contained in Paragraph (10) of relators' petition.

[fol. 218] Eleventh. Interveners admit the allegations of Paragraph (11) of relators' petition in so far as it is quoted below:

"Thereafter, full hearings were held by the Commission in its Docket 15682 upon the issues presented by the petition of said Missouri-Kansas-Texas Railroad Company, the said petitions of intervention and various other motions and petitions filed by the parties to said cause, and on November 10, 1925, the Commission issued its report in said cause, said report being published in Volume 104 of the Interstate Commerce Commission Reports at page 203. A copy of said report, together with the dissents of various Commissioners, is attached hereto as Exhibit 5."

Further answering Paragraph (11) of relators' petition, interveners deny that the Commission disregarded any of the facts and circumstances involved in the determination of the case. The Commission had before it and gave careful consideration to the operating agreement. It very properly found that the payment of bonds, interest, and taxes was not a payment for use but was a capital charge. The relators, by their allegations in Paragraph (11), show a total misconception of the entire tenor and meaning of the operating agreement which is attached to the petition as Exhibit 1. Under the terms of this agreement, the relators did not simply acquire a right to use the facilities of the

terminal company; they acquired stock in the corporation which has title to the property. The payments which they are to make under the operating agreement are to be made in protection of that title. The provisions for distributing the maintenance costs on a user basis had nothing to do with the protection of the title, but is an entirely different matter. The relators appear to take the position that they may continue to retain the stock ownership in the terminal company which they acquired under the provisions of a contract, and at the same time be relieved from the duty and obligation of paying the purchase price. In the absence of fraud, the Interstate Commerce Commission, a court of law, or a court of equity would not have power to grant such relief.

In lieu of the statement of the relators in Paragraph (11) as to the Commission's decision in its Docket No. 15682, we [fol. 219] quote as full answer thereto the language of the Commission itself:

"Obviously, the interveners are not in the latter situation. They have been and are in all respects entitled to the past, present, and future enjoyment of the terminals in question, and have enjoyed and now enjoy them in their own right as virtual coproprietors. They and the other proprietary lines have the equitable title to the property and franchises in undivided equal shares, and through their corporate instrument, the respondent, the facilities are controlled and operated. Not only so, those interveners, equally with the other proprietaries, have been and still are parties to the operating agreement, and to accord them the desired relief would necessarily involve to that extent what would amount to a revision or reformation of that agreement. They do not seek an abrogation of the entire agreement as wholly invalid and not to be binding upon them in any part, but merely, however stated, that certain of its provisions be in effect rewritten. A contention by the Alton that it would not in terms require a revision of the agreement, but merely a revision of the charges now imposed upon that line, would seem to express a distinction without a difference. Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed. The

power and authority thus invoked are not conferred by the quoted paragraph.

"Certain of the interveners cite the provision of section 15a of the act, that we shall initiate, modify, establish, or adjust reasonable rates so that the carriers of the country, as a whole or by groups, will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of their railway property held for and used in the service of transportation. They contend that, giving effect to the policy reflected in that provision and without waiting until a carrier's bankruptcy shall ensue, we need only find as a fact that the operating agreement, improvidently entered into, is so burdensome to them as to result in inefficient and uneconomical operation of their railways, to cause misapplication by them of funds created for an en- [fol. 220] tirely different purpose, and generally to operate to impair their ability to furnish adequate railway service, and our jurisdiction for the purpose of the desired relief will at once attach. However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. What the provision requires or authorizes us to do is to fix remunerative reasonable rates in circumstances which embrace honest, efficient, and economical management as a condition or limitation. We should have the information in that respect which will aid an effective exercise of our duty and authority, but we are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers. Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act.

"Paragraphs (1) and (3) of section 3 are put forward as vitiating the operating agreement in so far as it provides for the equal division of interest and taxes. Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect

whatsoever, chargeable to any common carrier or carriers subject to the act. Paragraph (3) commands the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding, and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed, by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equi- [fol. 221] table titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

"An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee, and Alton.

Twelfth. In answer to Paragraph (12) of relators' petition, interveners say it is true that the Commission by its order in the case of Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company, No. 15682, entered an order dismissing the intervening petitions filed by the Chicago and Alton Railroad Company and its receivers; the Chicago, Milwaukee and St. Paul Railroad Company; Wabash Railway Company; the St. Louis-San Francisco Railway Company; and the relators, the Kansas City Southern Railway Company and the Chicago Great Western Railroad Company. Interveners deny, however, that since the entry of said order the re-

lators have had no right to be heard in said cause and deny that they have not had a right of review of any order which may be made therein in defense of their rights.

As a positive fact, the following interveners in said Docket No. 15682 were heard and are still participating in said cause: The Atchison, Topeka and Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; The Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company; and Missouri Pacific Railroad Company. These interveners last above named were seeking by their intervening petitions to protect their rights in the property as effected by the user rights sought by the Missouri-Kansas-Texas Railroad Company. The relators and the interveners whose intervening petitions were dismissed as shown by the intervening petitions attached to the petition, were seeking to have the Commission change their relation to the property by [fol. 222] abrogation and modification of the contract under which they acquired the terminal stock. The relators have no grounds to state that the Commission would have refused to entertain an intervening petition in opposition to the Missouri-Kansas-Texas Railroad Company's claim nor have they occasion to state that the Commission would not have heard them in protection of their rights thereunder. The only conclusion that the Commission reached was that it did not have jurisdiction to grant to the relators the relief which they sought in their intervening petitions. In so far as their interests are affected by any order which the Commission may make as to the uses of the property by the Missouri-Kansas-Texas Railroad Company, a non-proprietary company, the relators could have sought and obtained a full hearing. The relators by their intervening petitions, being in a different legal status from the Missouri-Kansas-Texas Railroad Company, were seeking a relief which the Commission had no jurisdiction to grant.

Thirteenth. In answer to Paragraph (13) of relators' petition, interveners admit that subsequent to the report of the Commission in docket No. 15682 on November 10, 1925, the right of the Missouri-Kansas-Texas Railroad Company, which was not a party to the operating agreement and which was not one of the proprietary companies, to elect not to assume the operating agreement was sus-

tained in the Court. Interveners also admit that in March, 1931, the Missouri-Kansas-Texas Railroad Company filed with the Interstate Commerce Commission an application for further hearing in said cause for the purpose of having the Commission determine the amount of compensation which should be paid for a limited use of the facilities of the terminal company. Interveners also admit that this application for a rehearing was the next step taken in the cause before the Commission after the Commission's order of November 10, 1925. Interveners also admit that the relators herein filed a petition with the Commission seeking a rehearing upon the Commission's order of November 10, 1925, in so far as it dismissed their intervening petitions in that cause and that said petition for rehearing was denied. Interveners admit that the Interstate Commerce Commission has had numerous hearings growing out of the complaint of the Missouri-Kansas-Texas Railroad Company, the last of such hearings being had on June 1, 1933.

[fol. 223] Interveners deny that relators will and have been unable to take any part in said hearings in order to protect their interests and deny that the Commission's order of November 10, 1925, terminated and barred their right to be heard. The Rules of Practice of the Interstate Commerce Commission, and particularly Paragraph (1) 1 of Rule II, permit anyone under the Interstate Commerce Act to complain to the Commission and anyone having an interest in any complaint may petition for leave to intervene in any pending proceeding prior to or at the time that it is called for hearing, but not after except for good cause shown. In truth and in fact the Interstate Commerce Commission permitted the proprietary companies under the operating agreement to intervene in said cause and to be heard in so far as their interests might be affected by any order which the Commission might make in said cause on the complaint of the Missouri-Kansas-Texas Railroad Company. Relators by their intervening petitions did not seek to protect their rights as they might be affected by any order which might be made in connection with the complaint of the Missouri-Kansas-Texas Railroad Company. On the other hand, the relators, by their intervening petitions, sought to have other and different rights adjudicated and sought affirmative relief, which the Commission prop-

erly decided was beyond its jurisdiction to grant. After the dismissal of these intervening petitions by the relators, they had as a matter of right until June 1, 1933, to file an intervening petition with the Interstate Commerce Commission for the purpose of participating in said cause and seeking to be heard on the question as to whether any order or orders made upon the complaint of the Missouri-Kansas-Texas Railroad Company would in any way affect their rights in the use and ownership of the property. For good cause shown, these relators could have, after June 1, 1933, sought to appear and be heard in said cause for their protection of rights.

Relators wholly disregarded the nature of their intervening petitions and the affirmative action there sought. They also wholly disregard the difference between their legal status as stock owners of the terminal company property with full rights of use and that of the Missouri-Kansas-Texas Railroad Company which had no property rights but which was only seeking a limited use under such com- [fol. 224] pensation as would be fair and reasonable for such use.

It is admitted that temporarily and until final action shall be taken by the Commission or by the Courts, in the event the case shall come before the Courts, the Missouri-Kansas-Texas Railroad Company is using the terminal facilities under the terms of the operating agreement.

Fourteenth. For their answer to Paragraph (14) of relators' petition, interveners say that the issues involved in docket No. 15682 are entirely separate and distinct from the issues which are raised by the relators in their intervening petitions. The Missouri-Kansas-Texas Railroad Company is seeking by process in the nature of condemnation to be permitted to use, upon conditions and for the compensation which may be fixed by the Commission, the property of others. No order that the Commission can or will make could have the effect of conferring upon the Missouri-Kansas-Texas Railroad Company any title to the terminal properties in Kansas City. The only order which the Commission could make would be an order requiring, upon conditions named, the proprietary companies and the terminal company to permit the Missouri-Kansas-Texas Railroad Company to a use of the facilities, which use would have to be limited by the terms of the order itself. The

relators by their intervening petitions, on the other hand, are seeking to have the Commission determine rights of property which were acquired through a contract legally made and duly executed by the relators. The relators are seeking to have this Court hold that the Commission has jurisdiction by order to determine that the title of the relators and their interest in the terminal company stock itself shall not be equal to but shall be something less than that which they acquired by the execution of the contract. By the same token, relators are seeking to have this Court hold that the Interstate Commerce Commission has jurisdiction to determine that the ownership of the terminal company stock by the other proprietary companies shall be something greater or less than that which was acquired through the execution of the contract.

Further answering Paragraph (14) of relators' petition, the effect of any order which the Commission may make in favor of the Missouri-Kansas-Texas Railroad Company will not only have no effect upon the title to the terminal [fol. 225] company stock but also will relieve the relators and all other proprietary companies of certain expenses which are now distributed among all companies on the user basis. The upkeep of the property and the maintenance expenses are divided among all users upon a user basis. It naturally follows that, other things being equal, the greater the number of users the less each user will have to pay as its proportion of those expenses which are so divided.

Further answering Paragraph (14) of relators' petition, interveners neither affirm nor deny the presumptions alleged as to the action that the Commission may or may not take in connection with docket No. 15682 as to the compensation which the Missouri-Kansas-Texas Railroad Company shall pay for the use of the terminal facilities. The correctness or incorrectness of such a presumption is not within the knowledge of relators or interveners. What the conclusions of the Commission — as to the rights and privileges which the Missouri-Kansas-Texas Railroad Company shall enjoy in the use of the terminal facilities can not, of course, be known until final determination of the cause.

Fifteenth. In answer to Paragraph (15) of relators' petition, interveners say that the relators throughout this

paragraph have again failed to make the legal distinction between property rights acquired under the contract and user rights which may be acquired, either by agreement or by order, by non-proprietary companies not parties to the contract and who are seeking no title to the property.

Sixteenth. Answering Paragraph (16) of relators' petition, interveners say that all of the allegations contained therein are conclusions of law with which interveners do not agree and which constitute the legal question to be determined by this Court.

The relators failed to point out to this Court any legal provision which empowers the Interstate Commerce Commission to grant to relators the relief which they are seeking. Interveners deny that there is any such provision of law.

Seventeenth. The allegation in Paragraph (17) of relators' petition also constitutes conclusions of law with which interveners do not agree and constitutes the legal question to be determined by this Court.

[fol. 226] Eighteenth. In answer to Paragraph (18) of relators' petition, interveners say that the relators have again pleaded conclusions of law which constitute the legal questions which are to be determined by this Court.

Further answering Paragraph (18), interveners deny that relators are without adequate legal remedy. Under the Rules of Practice of the Interstate Commerce Commission, after the Commission had determined that it had no jurisdiction to grant the relief sought by relators they had an opportunity to file an intervening petition for the purpose of having their rights protected in so far as those rights might be affected by any order made in docket No. 15682. In the event the Commission entered an order which relators deemed to be unlawful because not protecting such rights, relators had the right and power under the law to bring an action in court to determine such rights. If this legal remedy has been lost, it has been lost through the laches of relators and not because of any action of the Interstate Commerce Commission in refusing to take jurisdiction to grant the relief which they had sought.

Nineteenth. Interveners further say that none of the admissions made by the interveners as to the truth of facts alleged in the relators' petition are to be taken and con-

sidered as an admission that such facts are pertinent and relevant to the relief sought by relators in this cause. Interveners allege that none of the facts, although admitted to be true, are relevant and that if true they do not constitute a basis upon which the Court could found a writ of mandamus.

Twentieth. Interveners further say that the order of the Commission dismissing the intervening petitions of the relators in docket No. 15682 was a negative order and is not subject to review by the courts in a proceeding of mandamus or otherwise. Such has been so held by the Supreme Court of the United States in many decisions, the last of which is the case of Interstate Commerce Commission v. United States of America on the relation of J. C. Campbell and others, trading as the Birch Valley Lumber Company, being Cause No. 748, on the assignment to the Supreme Court for the October term, 1932, and decision handed down May 8, 1933 (not as yet published in the official reports).

[fol. 227] Wherefore, the premises considered, interveners pray an order of this Court denying the writ of mandamus and dismissing the cause

Respectfully submitted, Charles H. Woods, E. A. Boyd, 1211 Railway Exchange Bldg., Chicago, Ill.; Bruce Scott, Walter McFarland, 547 W. Jackson Blvd., Chicago, Ill.; W. F. Dickinson, W. A. Peters, La Salle Street Station, Chicago, Ill.; J. M. Souby, 1416 Dodge Street, Omaha, Neb., Attorneys for Interveners. Lawrence H. Cake, 1040 Washington Bldg., Washington, D. C., Atty. for Petitioners.

Duly sworn to by Charles H. Woods. Jurat omitted in printing.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

PETITION OF KANSAS CITY TERMINAL RAILWAY COMPANY FOR LEAVE TO INTERVENE AS RESPONDENT—Filed June 22, 1933

* * * * * * *

Comes now Kansas City Terminal Railway Company, and petitions the Court for leave to intervene in the above

[fol. 228] entitled and numbered cause as a party respondent and with leave to plead in said cause and participate therein in all respects and to the same extent as though it had been made a party respondent herein in the first instance.

As grounds for this petition, petitioner shows:

First. That the petition of the relators in this cause shows on its face that the rights of your petitioner will be vitally affected by any order or orders which may be entered by this Court herein.

Second. That the facts, in so far as they are relevant, upon which the relators rely, as alleged in their petition for writ of mandamus, except in so far as relators plead conclusions of law, are not in dispute.

Third. That if petitioner is permitted to intervene herein as party respondent, the legal questions involved can be determined in this cause as between the relators and this petitioner, thereby avoiding further expensive litigation between the same parties upon the same subject matter.

Fourth. Petitioner states upon information and belief that the respondent, Interstate Commerce Commission, does not and will not object to this petitioner becoming a party to this action with all the rights of a respondent herein.

Wherefore, the promises considered, petitioner, Kansas City Terminal Railway Company, prays an order of this Court permitting it to intervene in this cause as a party respondent.

Respectfully subm. ted, Lawrence H. Cake, 1040 Washington Building, Washington, D. C. Samuel W. Sawyer, 1900 Fidelity Bank Building, Kansas City, Missouri. John H. Lathrop, 1900 Fidelity Bank Building, Kansas City, Missouri. George O. Pratt, 1900 Fidelity Bank Building, Kansas City, Missouri.

[fol. 229] In Supreme Court of District of Columbia

Memorandum

June 22, 1933—Leave granted Kansas City Terminal Railway Co. to intervene as party respondent. Adkins, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ANSWER OF KANSAS CITY TERMINAL RAILWAY COMPANY, INTERVENER, TO THE PETITION OF THE RELATORS—Filed June 22, 1933

* * * * * * *

Comes now Kansas City Terminal Railway Company as intervener, by leave of court and for answer to the petition of the relators—Chicago Great Western Railroad Company and The Kansas City Southern Railway Company—and in response to the rule to show cause, duly made and entered on the thirty-first day of May, 1933, alleges:

First. Intervener admits as true the allegations contained in Paragraph (1) of relators' petition.

Second. Intervener admits as true the allegations contained in Paragraph (2) of relators' petition.

Further answering Paragraph (2) of relators' petition, intervener says that the lines of railroad of relators connect at Kansas City, Missouri, with the railroads of the various proprietary companies entering Kansas City, Missouri and Kansas City, Kansas, through the use of the joint terminal facilities owned and operated by Kansas City Terminal Railway Company, intervener, and also in many instances through direct connections with such railroads.

Third. Intervener admits as true the allegations contained in Paragraph (3) of relators' petition.

Fourth. Intervener admits as true the allegations contained in Paragraph (4) of relators' petition.

Further answering Paragraph (4) of relators' petition, intervener admits that it is a carrier engaged in interstate commerce but states that it is a terminal corporation furnishing terminal facilities for the proprietary common carriers in connection with the interchange of freight and passengers at Kansas City, Missouri and Kansas City, Kansas. It is a terminal and switching line. In receiving and delivering to a line haul carrier for transportation, any [fol. 230] goods or merchandise, it acts as the agent of such line haul carrier and assumes no obligations other than that of a switching line.

Fifth. Intervener admits as true the allegations contained in Paragraph (5) of relators' petition.

Sixth. Intervener admits as true the allegations contained in Paragraph (6) of relators' petition.

Seventh. Intervener admits as true the allegations contained in Paragraph (7) of relators' petition.

Eighth. Intervener admits as true the following allegation in Paragraph (8) of relators' petition:

"Under Section 1 of Article II of the Operating Agreement, the Proprietary Companies, including relators, were required to pay, as the same became due, one-twelfth of all interest due upon the first mortgage bonds of the Terminal Company amounting to $50,000,000, one-twelfth of the principal of said bonds as and when the same became due and payable, and one-twelfth of the taxes, rates, benefits, assessments or other governmental charges of any kind made against the Terminal Company or its properties. Said Proprietary Companies, including relators, were also required to assume, in equal parts, any of the aforementioned amounts due from any one of them which might be in default or fail to make the payments required of it under said Operating Agreement."

but denies the remainder of said paragraph except as hereinafter admitted.

Further answering Paragraph (8) of relators' petition, intervener alleges that the matter of the distribution of the charges to the proprietary companies, as to those items in Article II of the operating agreement which are paid upon a user basis, is not precisely as alleged by the relators. Under Section 6 of Article II of the Operating Agreement the property of the Kansas City Terminal Railway Company is divided into a number of zones. A separate accounting as to operation, maintenance, renewal, repair, and other expenses of the Kansas City Terminal Railway Company is kept for each zone. The proprietary companies contribute toward the payment of these items only in proportion to their use of the facilities within the zone. If, during any month, any one of the proprietary companies makes no use of a particular zone, it participates in no payment of the items involved in connection with that zone. [fol. 231] The payment of the items which are dealt with

under a user basis varies from month to month and as between the different proprietary companies in each of the varying zones. Each and all of the proprietary companies have an equal right to use any one or all of the zones if seen fit to exercise that right. No company participates in the maintenance and other items of expense in connection with any zone in any month in which it fails to make use thereof or to exercise its rights. There is therefore no fixed percentage which could be arrived at as a permanent factor upon which to base an apportionment of the items which are payable on a user basis. The percentage of such items is entirely within the control and is at the election of the company which sees fit to make use of the facilities lying within any particular zone. Each company's use varies from month to month and in the same month as to any zone.

Further answering Paragraph (8) of relators' petition, intervener alleges that each of the proprietary companies, including the relators, who are parties to the Operating Agreement and the Supplemental Operating Agreement, designated by relators as Exhibit 1 to the petition, who are the owners of all of the stock of the Terminal Company, have the right under the terms of the contract to make such use of the Terminal Company's facilities as it may elect to use. No proprietary company has any greater right to the use of the facilities than any other proprietary company. Certain of the proprietary companies have seen fit to exercise their right to use so granted by the Operating Agreement to a greater extent than other proprietary companies. Such greater use by certain of the proprietary companies has never at any time prevented the other proprietary companies, including the relators, from exercising their full rights to the fullest use of the terminal facilities. No discrimination in fact exists as to the use of such facilities by any of the proprietary companies. What the relators term "discrimination" is not created by the terms of the operating agreement, but it is the result of the failure of relators to exercise the full rights which have been granted to relators under and by virtue of the operating agreement.

Further answering Paragraph (8) of relators' petition, intervener alleges that if the matters alleged in relators' petition amount to a discrimination, which is not admitted

[fol. 232] but is specifically denied by intervener, it is the result of a contract voluntarily entered into by the parties and is not such a discrimination as comes within the terms of the Interstate Commerce Act.

Intervener is without present knowledge as to the exact correctness of the sums of money stated in Paragraph (8) of relators' petition and in Exhibit 2 to said petition, but believes that the same are all substantially correct on the basis made up, but denies that the basis of measuring use adopted by relators is a true measure of actual use. Intervener denies, however, that said sums illustrate any gross discrimination as alleged in relators' petition. Intervener alleges that said payments were made on the basis of the operating agreement entered into between each and all of the proprietary companies, including the relators, and were the only payments which could have been made in compliance with said agreement.

Further answering Paragraph (8) of relators' petition, intervener states that said operating agreement and the agreements of the proprietary companies to pay their proportionate parts of interest and taxes and the principal of said bonds, as provided therein, were in pursuance thereof pledged with the trustee under the mortgage securing said bonds as additional security for said bonds, that said trustee is not a party to said case No.. 15,682 and that the Interstate Commerce Commission has no power in said case No. 15,682, or otherwise, to make any order adversely affecting the rights of the holders of said bonds.

Ninth. Intervener admits as true the allegations in Paragraph (9) of relators' petition, but denies the relevancy thereof.

Further answering Paragraph (9) of relators' petition, intervener says that the legal status of the Missouri-Kansas-Texas Railroad Company in its use of the terminal facilities of intervener at Kansas City differs materially from that of the relators herein, in that the Missouri-Kansas-Texas Railroad Company has no proprietary right whatsoever in said Terminal property and facilities. Unless Missouri-Kansas-Texas Railroad Company meets the conditions imposed by the Interstate Commerce Commission in the proceedings pending before the Commission, it will become a mere trespasser upon the property of others. In contrast, relators enter the property and use

the facilities as joint and equal owners with the other [fol. 233] owners of the Terminal Company. By virtue of their stock ownership and by virtue of the operating agreement, relators acquired specific property and user rights equal to that of all of the other proprietary companies. Relators likewise assumed obligations equal to, no greater and no less than, the other proprietary companies. Their stock ownership was acquired with full knowledge of the fact that the property of the Terminal Company was encumbered by a deed of trust to secure the payment of bonds, and they assented to the pledge of their obligations under the operating agreement to secure said bonds.

A failure to exercise the rights acquired is a matter of relators' own election. With such election the Interstate Commerce Commission, this Court, and the other proprietary companies have no concern and over such election they have no control. There is no process of law, condemnation or otherwise, by which these rights now possessed can be enlarged, or the obligations assumed diminished.

Tenth. Intervener admits as true the allegations contained in Paragraph (10) of relators' petition, except that it denies that all of the smaller users filed intervening petitions similar to relators.

Eleventh. Intervener admits the allegations of Paragraph (11) of relators' petition in so far as it is quoted below:

"Thereafter, full hearings were held by the Commission in its Docket 15682 upon the issues presented by the petition of said Missouri-Kansas-Texas Railroad Company, the said petitions of intervention and various other motions and petitions filed by the parties to said cause, and on November 10, 1925, the Commission issued its report in said cause, said report being published in Volume 104 of the Interstate Commerce Commission Reports at page 203. A copy of said report, together with the dissents of various Commissioners, is attached hereto as Exhibit 5."

Further answering Paragraph (11) of relators' petition, intervener denies that the Commission disregarded any of the facts and circumstances involved in the determination of the case, and denies the conclusions contained in said paragraph (11). Consideration of the opinion discloses not

only that the Commission did not disregard any material [fol. 234] facts and circumstances but that in truth and in fact it gave careful consideration to the operating agreement and all of the terms thereof.

Twelfth. In answer to Paragraph (12) of relators' petition, intervener admits that the Commission by its order in the case of Missouri-Kansas-Texas Railroad Company v. Kansas City Terminal Railway Company, No. 15682, entered an order dismissing the intervening petition filed by the Chicago and Alton Railroad Company and its receivers; the Chicago, Milwaukee and St. Paul Railroad Company; Wabash Railway Company; St. Louis-San Francisco Railway Company; and the relators, the Kansas City Southern Railway Company and the Chicago Great Western Railroad Company, but denies that the entry of such order had the effect of denying relators the right to be heard in said cause and foreclosed relators from the right to review of such order.

Thirteenth. In answer to Paragraph (13) of relators' petition, intervener admits that subsequent to the report of the Commission in docket No. 15682 on November 10, 1925, the right of the Missouri-Kansas-Texas Railroad Company, which was not a party to the operating agreement and which was not one of the proprietary companies, to elect not to assume the operating agreement was sustained in Court; that in March, 1931, the Missouri-Kansas-Texas Railroad Company filed with the Interstate Commerce Commission an application for further hearing in said cause for the purpose of having the Commission determine the amount of compensation which should be paid for a limited use of the facilities of the Terminal Company; that this application for a rehearing was the next step taken in the cause before the Commission after the Commission's order of November 10, 1925; that the relators herein filed a petition with the Commission seeking a rehearing upon the Commission's order of November 10, 1925, in so far as it dismissed their intervening petitions in that cause and that said petition for rehearing was denied; that the Interstate Commerce Commission has had numerous hearings growing out of the complaint of the Missouri-Kansas-Texas Railroad Company, the last of such hearings being had on June 1, 1933, and that thus intervener's facilities are being

used in a very similar way (though not precisely the same) as on November 10, 1925.

[fol. 235] Intervener denies, however, that relators have been and will be unable to take any part in said hearings in order to protect their interests and denies that the Commission's order of November 10, 1925, terminated and barred their right to be heard.

Fourteenth. Answering Paragraph (14) of relator's petition, intervener says that said paragraph consists entirely of legal conclusions and therefore this intervener denies the same.

Fifteenth. Answering Paragraph (15) of relators' petition, intervener admits that the Receivers of the Wabash Railway Company have undertaken to renounce the operating agreement but states that the other allegations of said paragraph are conclusions of law and therefore denies the same.

Sixteenth. Answering Paragraph (16) of relators' petition, intervener says that all of the allegations contained therein are conclusions of law with which intervener does not agree and which constitute the legal question to be determined by this Court and intervener therefore denies the allegations of Paragraph (16).

Seventeenth. The allegation in Paragraph (17) of relators' petition also constitutes conclusions of law with which intervener does not agree and constitutes the legal question to be determined by this Court and intervener therefore denies the allegations of Paragraph (17).

Eighteenth. In answer to Paragraph (18) of relators' petition, intervener says that the relators have again pleaded conclusions of law which constitute the legal questions which are to be determined by this Court and intervener therefore denies the allegations of Paragraph (18).

Further answering Paragraph (18), intervener denies that relators are without adequate legal remedy. Under the Rules of Practice of the Interstate Commerce Commission, after the Commission had determined that it had no jurisdiction to grant the relief sought by relators they had an opportunity to file an intervening petition for the purpose of having their rights protected in so far as those rights might be affected by any order made in Docket No.

15682. In the event the Commission entered an order which relators deemed to be unlawful because not protecting such rights, relators had the right and power under the law to bring an action in court to determine such rights. If this legal remedy has been lost, it has been lost through [fol. 236] the neglect, delay and refusal of relators to assert their legal rights, and not because of any action of the Interstate Commerce Commission in refusing to take jurisdiction to grant the relief which they had sought.

Nineteenth. Further answering relators' petition, intervener says that interveners' facilities in Kansas City, Missouri, were constructed in pursuance of ordinance of Kansas City No. 2336, which said ordinance was in evidence before the Commission in said case No. 15682, that said ordinance contemplated the use of said facilities by all of said twelve original parties to the operating agreement and their successors in interest under the terms of said operating agreement and required the acceptance of certain provisions of said ordinance by all of said companies parties to the operating agreement; that the city of Kansas City is not a party to said case No. 15682 and that the Interstate Commerce Commission has no power to make any order therein affecting the rights of the city of Kansas City.

Twentieth. Intervener further says that none of the admissions made by intervener as to the truth of facts alleged in the relators' petition are to be taken and considered as an admission that such facts are pertinent and relevant to the relief sought by relators in this cause. Intervener alleges that none of the facts, although admitted to be true, are relevant and that if true they do not constitute a basis upon which the Court could found a writ of mandamus.

Twenty-first. Intervener further says that the order of the Interstate Commerce Commission dismissing the intervening petitions of the relators in Docket No. 15682 was a negative order and is not subject to review by the courts in a proceeding of mandamus or otherwise.

Twenty-second. Further answering relators' petition, intervener alleges that by their petition relators seek to have this court authorize and direct the Interstate Commerce Commission to take jurisdiction to determine as to whether or not relators may remain proprietors of the Terminal

Company, through stock ownership, with all the rights and privileges growing out of that proprietorship, and at the same time permit them to avoid the terms of the contract under which they became proprietors. Intervener alleges that relators' petition amounts to a plea for reformation of the operating agreement and also a modification or nullification of said operating agreement and intervener fur- [fol. 237] ther alleges that the Interstate Commerce Commission has no power or jurisdiction to reform, modify, or nullify said operating agreement. Intervener further alleges that neither any paragraph of Section 3 of the Interstate Commerce Act as amended by the Transportation Act of 1920, nor any other provision of the Interstate Commerce Act, nor any other Act of Congress whatsoever, gives the Interstate Commerce Commission any power to modify, supersede, nullify, or ignore existing contracts between carriers in regard to the use of terminal facilities.

Further answering relators' petition, intervener alleges that if any paragraph of Section 3 of the Interstate Commerce Act as amended by the Transportation Act of 1920, or any other provision of the Interstate Commerce Act, or any other Act of Congress purported to give the Interstate Commerce Commission any such power, then such Act of Congress or provision thereof is unconstitutional and void and in violation of section 2 of Article III of the Constitution of the United States and the Fifth Amendment to the Constitution of the United States. Intervener further alleges that any order made by the Interstate Commerce Commission granting the petition of relators would operate to deprive intervener of its property without due process of law in violation of said provisions of the Constitution of the United States and is beyond the power and jurisdiction of the Interstate Commerce Commission.

Wherefore, the premises considered, intervener prays an order of this Court denying the writ of mandamus and dismissing the cause.

Respectfully submitted, Lawrence H. Cake, 1040 Washington Bldg., Washington, D. C. Samuel W. Sawyer, 1900 Fidelity Bank Bldg., Kansas City, Mo. John H. Lathrop, 1900 Fidelity Bank Bldg., Kansas City, Mo. George O. Pratt, 1900 Fidelity Bank Bldg., Kansas City, Mo.

[fol. 238] *Duly sworn to by Samuel W. Sawyer. Jurat omitted in printing.*

In Supreme Court of District of Columbia

Demurrer to Answer—Filed June 22, 1933

* * * * * * *

Now comes The Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, relators herein, and demur to the answers filed herein by respondent, Interstate Commerce Commission, as amended, and by the interveners, Atchison, Topeka & Santa Fe Railway Company, Missouri Pacific Railway Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and Kansas City Terminal Railway Company, and for cause of demurrer say that the answers of said respondent and said interveners are bad in substance.

For reasons for said demurrer, and the matters of law intended to be argued in support thereof, the relators assign the following:

1. The petition herein states a cause of action and the answers of respondent and interveners admit the essential allegations of said petition and make no material allegations of fact in contravention thereof.

2. Under the admitted facts the law requires that the Interstate Commerce Commission exercise the jurisdiction which it has heretofore failed and refused to exercise and that by failing and refusing to so exercise its said power and [fol. 239] jurisdiction, the said Commission has inflicted upon the relators an injury for which there is no adequate remedy other than a writ of mandamus from this Court requiring the said Commission to exercise its said jurisdiction.

F. H. Moore, Ralph M. Shaw, A. F. Smith, F. H. Towner, Attorneys for Relators.

Service of copy of the foregoing demurrer acknowledged this 22nd day of June, 1933.

H. L. Underwood, Attorney for Interstate Commerce Commission. E. A. Boyd, Attorneys for Interveners Atchison, Topeka & Santa Fe Railway Co. et al. Sam W. Sawyer, Attorneys for Intervener Kansas City Terminal Railway Co.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

Session resumed pursuant to adjournment, Hon. Jesse C. Adkins, Justice, presiding.

* * * * * * *

JUDGMENT—June 23, 1933

This cause coming on to be heard upon the petition and the exhibits thereto attached, the answer of the respondent to said petition, as amended, and the answers of the interveners, and the demurrer of the relators to said answers, and upon consideration thereof it is ordered and adjudged, this 23rd day of June, 1933, that said demurrer be, and the same is hereby overruled.

Thereupon, the relators by their attorneys, electing to stand upon their demurrer, it is ordered that the petition herein be, and the same is hereby dismissed.

From the foregoing judgment the petitioners, by their attorneys, in open court, note an appeal to the Court of Appeals, which is hereby allowed upon the filing of bond for costs in the sum of $100, with leave to deposit the sum of $50 in cash, with the clerk in lieu thereof.

[fol. 240] MEMORANDUM

July 6, 1933.—$50 deposit by Gower in lieu of bond on appeal.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION OF COUNSEL ON APPEAL—Filed July 6, 1933

* * * * * * *

Be it remembered that on the 22nd day of June, A. D. 1933, before the Honorable Jesse C. Adkins, one of the Justices of said Court, this cause came on for hearing upon the pleadings heretofore filed herein.

Appearances: F. H. Towner, on behalf of Relators. H. L. Underwood, on behalf of Respondent. E. A. Boyd and S. W. Sawyer, on behalf of Interveners.

Whereupon, the following proceedings were had:

"Mr. Boyd: I ask the Court to permit the Missouri Pacific Railroad Company to be considered as a party to the petition of intervention and answer heretofore filed herein on behalf of The Atchison, Topeka and Santa Fe Railway Company, et al."

"Mr. Towner: I have no objection."

Whereupon, the following stipulation was entered into by counsel for the parties:

"It is agreed between the parties:

1. That the stock trust agreement referred — in Paragraph 5 of the petition herein and in Paragraph 2 of the answer of the Interstate Commerce Commission shall be considered as exhibit numbered 6 to the petition.

2. That the Commission agrees that the $50,000,000 worth of bonds referred to in Paragraph 4 of its answer was issued and sold by the Kansas City Terminal Railway Company, but that some of them were sold after the date of the Commission's report; that the Commission admits the truth of the allegations contained in Paragraph 8 of the petition with respect to the facts, circumstances and conditions subsequent to the making of this report and order of November 10, 1925, a disclaimer of which appears at the bottom of page 7 of the Commission's answer; that the Commission [fol. 241] admits the truth of the allegations contained in Paragraph 13 of the petition with respect to the use of the facilities of the Kansas City Terminal Railway Company subsequent to November 10, 1925, a disclaimer of which appears in the last sentence of the first paragraph on page 8 of its answer; that the Commission in so admitting is not to be understood as agreeing that the amount of use is the same but that the same basis of payment pertains as in 1925, that is, payments are made in the same proportion and percentages as originally, and by the same parties or their successors.

The foregoing admissions by the Commission are to be considered as amendments to its answer, but are not to be construed as admissions that the facts admitted are relevant to the case or competent or material for consideration in deciding it."

Whereupon, the cause was argued by counsel for the parties, after which the hearing in the above entitled matter was closed.

The foregoing statement of evidence is approved.

F. H. Towner, Attorneys for Relators. H. L. Underwood, Attorney for Respondent. Charles H. Woods, E. A. Boyd, S. W. Sawyer, Attorneys for Interveners.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS—Filed July 6, 1933

* * * * * * *

Now come the Relators, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, and say that the Supreme Court of the District of Columbia erred herein in the following particulars, which, upon their appeal to the Court of Appeals of the District of Columbia, said relators assign as errors:

[fol. 242] (1) The Court erred in failing to hold that the Interstate Commerce Commission, under Paragraphs (1), (3) and (4) of Section 3 of the Act to Regulate Commerce, had the jurisdiction contended for herein.

(2) The Court erred in failing to hold that the said Commission, in its report of November 10, 1925, made in its Docket 15682, denied that it had the jurisdiction contended for herein under said Paragraphs (1), (3) and (4) of said Section 3 of the Act to Regulate Commerce.

(3) The Court erred in failing to hold that relators were entitled to the writ of mandamus prayed for herein and in refusing to issue said writ.

(4) The Court erred in holding that relators were not entitled to the writ of mandamus prayed for herein; in overruling the demurrer filed by relators to the answers of respondent and interveners, and in dismissing the petition of relators.

Ralph M. Shaw, F. H. Moore, A. F. Smith, F. H. Towner, Attorneys for Relators.

Service of the above assignment of errors is hereby acknowledged this 5th day of July, 1933.

H. L. Underwood, Attorney for Interstate Commerce Commission. Charles H. Woods, E. A. Boyd, S. W. Sawyer, Attorneys for Interveners.

In Supreme Court of District of Columbia

Designation of Record—Filed July 6, 1933

* * * * * * *

Relators, having perfected an appeal herein to the Court of Appeals of the District of Columbia, hereby request the Clerk of the Supreme Court of the District of Columbia to prepare a transcript of the record on appeal including therein the following papers and proceedings, to-wit:

(1) Original petition and Exhibits 1, 2, 3, 4, 5 and 6; Exhibits 1 to 5, inclusive, being attached thereto, and Exhibit [fols. 243 & 244] 6 being stipulated upon the hearing herein as appears from the statement of evidence.

(2) Rule to show cause.

(3) Answer of Interstate Commerce Commission.

(4) Petition of The Atchison, Topeka and Sante Fe Railway Company, et al., for leave to intervene as respondents, and order entered thereon.

(5) Answer of The Atchison, Topeka and Santa Fe Railway Company, et al.

(6) Petition of Kansas City Terminal Railway Company for leave to intervene as a respondent, and order entered thereon.

(7) Answer of Kansas City Terminal Railway Company.

(8) Demurrer of relators to answers of Interstate Commerce Commission and interveners The Atchison, Topeka and Santa Fe Railway Company, et al.

(9) Stipulation of Counsel on appeal.

(10) Any opinion of the Court filed herein.

(11) Order overruling demurrer of relators dismissing petition and allowing appeal.

(12) Assignment of errors.

(13) This designation.

F. H. Towner, Attorney for Relators.

Service of the above designation is hereby acknowledged, this 5th day of July, 1933.

H. L. Underwood, Attorney for Respondent. Charles H. Woods, E. A. Boyd, S. W. Sawyer, Attorneys for Interveners.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 245] Thursday, April 5th, A. D. 1934.

* * * * * * *

No. 6068

THE UNITED STATES OF AMERICA ex Rel. CHICAGO GREAT WESTERN RAILROAD COMPANY and the Kansas City Southern Railway Company, Appellants,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Chicago, Rock Island and Pacific Railway Company, et al.

The argument in the above entitled cause was commenced by Mr. A. F. Smith, attorney for appellants, and was continued by Mr. E. M. Reidy, attorney for the Interstate Commerce Commission and by Mr. Samuel W. Sawyer, attorney for the Kansas City Terminal Railway Company, and was concluded by Mr. Frank H. Towner, attorney for appellants.

[fol. 246] COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 6068

THE UNITED STATES OF AMERICA ex Rel. CHICAGO GREAT WESTERN RAILROAD COMPANY and the Kansas City Southern Railway Company, Appellants,

v.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Chicago, Rock Island and Pacific Railway Company, et al., Appellees

Appeal from the Supreme Court of the District of Columbia

(Argued April 5, 1934. Decided May 7, 1934)

A. F. Smith, of Kansas City, Mo., F. H. Towner, of Chicago, Ill., and George E. Hamilton, John J. Hamilton,

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George E. Hamilton, Jr., and Henry R. Gower, all of Washington, D. C., for appellants.

Daniel W. Knowlton, H. L. Underwood, and E. M. Reidy, all of Washington, D. C., for Interstate Commerce Commission, appellee.

E. A. Boyd, of Chicago, Ill., and Lawrence H. Cake, of Washington, D. C., for Atchison, Topeka and Santa Fe Railway Company, et al., appellees.

Samuel W. Sawyer, of Kansas City, Mo., and Lawrence H. Cake, of Washington, D. C., for Kansas City Terminal Railway Company, appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices

GRONER, Associate Justice:

This is an appeal from a judgment denying a petition for mandamus. The history of the controversy goes back more than a quarter of a century. Boiled down it is this: In 1906 a Missouri corporation was organized for the purpose of acquiring, constructing, and operating a union station and terminal facilities in Kansas City, Missouri-Kansas. Ten railroad companies operating lines of railroad entering into or passing through Kansas City agreed to use the facilities of the terminal company. An operating agreement was entered into in 1909, and the next year appellants, Chicago Great Western R. R. Company and the Kansas City Southern Ry. Company, who were not among the original ten, became parties to the agreement to the same extent and in the same manner as the others. The terminal company acquired lands and rights of way neces- [fol. 247] sary to the accomplishment of the enterprise, and, some time after the agreement, the terminal was completed. The contract provided for equal ownership, equal control, and equal privileges in the use of the property as between the signatory companies. Each of the twelve railroads paid for $183,333.33 of stock in the terminal company, which was all of the stock issued. The agreements provided for the admission of other railroads in the use of the properties and facilities, each of the companies having an equal voice and vote in the matter of the admittance of other railroads. The terminal company issued and sold $50,000,000 of bonds secured by mortgage or deed of trust

on the property, each of the roads agreeing to pay an equal proportion of taxes and of interest on bonds. The stock of the terminal company owned by each of the railroad companies was deposited with a trustee. It was agreed that if any owning company should default in the payment of its share of the taxes, or principal or interest, such defaulted sum should be paid by the nondefaulting companies in equal parts. All other expenses, such, for instance, as maintenance, transportation expenses, and salaries and wages, were to be paid by the owning companies on a user basis. One of the parties to the agreement was the Missouri, Kansas and Texas Railway Company. In 1915 it was placed in the hands of receivers. The receivership was followed by a decree of foreclosure entered by the Federal court for the Eastern District of Missouri. The decree (of sale) provided that the purchaser might within a year from the date of the delivery of deeds and taking possession of the property, elect to adopt or reject any executory contract to which the old company was a party. The purchaser organized a corporation under the name of Missouri-Kansas-Texas Railroad Company to take over and operate the property purchased, and this company duly filed its election not to adopt the agreement of its predecessor company with relation to the terminal property, and then, being without terminal facilities in Kansas City, petitioned the Interstate Commerce Commission for an order pursuant to the provisions of paragraph 4 of section 3 of the Interstate Commerce Act (49 U. S. C. A. sec. 3 (4)) to accord it the right to use a designated portion of the terminal on an equitable basis, i.e., a basis on which compensation would be figured on the extent of the use. The Commission issued a temporary order effective April 1, 1924, permitting the new company for the time being to use the terminals upon the terms and provisions of the operating agreement and for the compensation therein provided, reserving for future determination the final measure of compensation for use during the period the service order should be in effect. The Commission gave the petition its docket number 15,682. The eleven other railroad companies filed intervening petitions before the Commission and participated in the proceedings. Some of the interveners, including appellants, sought to obtain the same relief as to terms that was sought by the petitioner (M. K. T. R. R. Co.). In due time the Commission

heard and considered the petition. At the time of rendering its decision (1925) a suit was pending in the Federal court in Missouri, the object of which was to have the court decree the Missouri-Kansas-Texas Railroad Company (the petitioner) bound by the terminal operating agreement entered into by its predecessor company, and the decision of the Commission noted the pendency of this proceeding and [fol. 248] held that if the new company should be adjudged to be bound by the operating agreement the relief prayed for could not be granted, and, if adjudged not to be bound, a subsequent order would be entered in accordance with the provisions of the Act, but the Commission construed the Act and held as to interveners (appellants) that the provisions relied upon were not sufficiently broad to authorize the Commission to grant the relief asked and dismissed the interventions.

After the Commission had filed its report (November 10, 1925) just above referred to, nothing more was done until 1931. In that year Missouri-Kansas-Texas Railroad (having in the meantime been successful in sustaining in the court proceeding its right to reject the contract of its predecessor company as to the terminal property) and these appellants each separately filed petitions with the Commission, the former to have determined the amount of compensation which it should pay under the provisions of section 3 (4) of the act for the use of the terminal facilities and the latter for a rehearing upon the order dismissing the intervening petitions. The Commission about the middle of 1931 denied a rehearing to interveners (appellants), and in 1933 this proceeding was begun by petition for a writ of mandamus to compel the Commission to set aside its order of November 10, 1925 (and also its order of June 1, 1931, denying interveners a rehearing). The Commission answered the petition and appellants filed a demurrer to the Commission's answer. The court below overruled the demurrer, and appellants electing to stand thereon, entered an order denying mandamus but allowing an appeal to this court.

We have, therefore, here a case in which twelve railroad companies operating to and through Kansas City enter into an agreement for the construction of joint freight and passenger terminal facilities with the right to all to use the same on equal terms for a period of 200 years. Each of

the companies subscribed to and paid for one twelfth of the total capital stock of the terminal company. After the terminal was completed that company operated in excess of 172 miles of track and reached 208 industries with its rails, and performed switching services for the user lines and for the industries. The cost of the terminal was ascertained at the time of completion to be in the neighborhood of $50,000,000. The interest on this amount and the taxes on the property the agreement divided equally among the twelve users and stockholders, that is to say, each company paid one twelfth of the aggregate of the items, interest and taxes, and assumed an equal and ratable liability for the payment of the principal. For this each railroad was entitled to equal operating rights for both its freight and passenger trains. The other charges in connection with the operation of the terminals, such as maintenance and operating expenses, were to be accounted for and assessed against each line in the proportion which its use of the facilities and tracks bore to the total use by it and the other lines. Detailed provisions were made with relation to the apportionment of these expenses, and no point is made that these were not fair and reasonable. The single point at issue involves the provisions of the agreement requiring each of the railroads to pay one twelfth of the taxes and one twelfth of the interest accruing on the terminal com-
[fol. 249] pany's bonds. Appellants and some of the smaller railroads, which, like themselves, use the terminal facilities, trackage, etc., far less extensively than some of the larger roads, consider the provision referred to inequitable and burdensome and insist upon a division of all charges upon a user basis. On the other hand, the larger railroads, while admittedly using the facilities to a greater extent, oppose any change in the contract basis. They tell us the Commission has no power to set aside the provisions of the contract, and they also say that, even if it has, the enforcement of the power would have calamitous consequences not only to the terminal in question but to other projects of a like kind. They point out that the operating agreement has been assigned as additional security for the bonds and that it was the agreement of all the lines to be equally bound that made the bonds attractive and induced investment in them, and, finally, that it is not the province or the duty of the Commission to save appellants from their own improvidence.

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With this view of the situation, we turn to the sections of the Interstate Commerce Act which appellants invoke as authorizing and requiring the Commission to do the things they ask. They are paragraphs 1 and 3 of section 3 of the Interstate Commerce Act, and paragraph 4 which was added to section 3 by the Transportation Act of 1920 (49 U. S. C. A. sec. 3 (1) (3) (4)), as follows:

"(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

"(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such

terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose [fol. 250] terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

In respect to appellants' argument as to the applicability of paragraphs 1 and 3, the Commission says in its report:

"Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect whatsoever, chargeable to any common carrier or carriers subject to the act. Paragraph (3) commands the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding, and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property.

Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3)."

And as to paragraph (4) the Commission says:

"The paragraph above quoted [sec. 3 (4)] empowers us, when found to be in the public interest and practicable, without impairing the ability of a carrier 'owning or entitled to the enjoyment of terminal facilities' to handle its own business, to require the use of the facilities by 'another carrier' or 'other carriers' upon terms and for compensation to be agreed upon or to be fixed as provided. The primary power to be exercised is to 'require the use' of the terminals, which power the further power to fix the compensation in appropriate circumstances merely supplements. The requirement is to be laid upon a carrier then 'owning or entitled to the enjoyment' of the facilities and for the benefit of 'another carrier' or 'other carriers'; in other words, to be laid upon a carrier owning or by lease or otherwise entitled to present enjoyment and for the benefit of a carrier or carriers not so owning or entitled.

"Obviously, the interveners are not in the latter situation. They have been and are in all respects entitled to [fol. 251] the past, present, and future enjoyment of the terminals in question, and have enjoyed and now enjoy them in their own right as virtual coproprietors. They and the other proprietary lines have the equitable title to the property and franchises in undivided equal shares, and through their corporate instrument, the respondent, the facilities are controlled and operated. Not only so, those interveners, equally with the other proprietaries, have been and still are parties to the operating agreement, and to accord them the desired relief would necessarily involve to that extent what would amount to a revision or reformation of that agreement. * * * Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed. The power and authority thus invoked are not conferred by the quoted paragraph."

These two quotations from the lengthy report of the Commission, which in the interest of clarity we think it proper to set out as fully as we do, sufficiently explain the

ground on which the Commission based its refusal to grant the relief asked. The Commission, no less than ourselves, was impressed with the hardship inherent in the case, for in its report it says: "This case strongly suggests the advisability of a reexamination by the respective participating carriers of terminal arrangements which have been developed through the past decades, including division of capital charges and adjustment of property interests. The subject is obviously of such importance to the public, including the railroads, that a reappraisal should be voluntarily undertaken in the light of present conditions." This suggestion of the Commission that the roads voluntarily amend the contract was obviously the result of the conclusion, inevitable in the circumstances, that the smaller railroads had made an unwise and oppressive agreement which in the light of subsequent events seriously impaired their ability to operate their properties on a satisfactory basis, and there can be no reasonable doubt either of the fact or the result. Appellant's use of the terminals now and for some years has averaged less than 3 per cent of the total use, whereas their contribution to the payment of interest and taxes is 8⅓ per cent. In dollars and cents each of the twelve railroads paid in the year 1932 on account of interest and taxes approximately $200,000. Had these charges been divided on a user basis, some of the larger roads would have paid approximately $600,000 and appellants only a little more than $50,000. This is so because some of the smaller roads use the terminals for a single passenger train a day whereas some of the larger roads operate from fifteen to twenty. No further illustrations are needed to show that the contract according to its terms imposes on the smaller lines payments altogether in excess of benefits received, and we have no reason to doubt that if the contract were now in the making the user basis as applied both to fixed charges and operating expenses would be considered the only fair and reasonable method to adopt.

The Commission, we think, share this view, and it is clear would have revised the contract accordingly if they could have interpreted the statutes broadly enough to justify such action. But appellants tell us that the statute is broad enough and that, in the view they are entitled to take, the refusal of the Commission to grant the relief is not grounded on a misinterpretation of the statute, but is

[fol. 252] in every respect a denial of jurisdiction. In support of this they quote from the opinion certain statements to the effect that "the power and authority thus invoked are not conferred by the quoted paragraph [the statute]", and again, "we are unable to find the requisite power or authority in any other provision of the act", and "we are unable to spell out from that provision such a jurisdiction." These statements they say indicate the view of the Commission that it was without jurisdiction. But we think the appellants' position in this respect is grounded upon a mistaken theory. It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask. The Commission is an administrative body and can exercise only the powers delegated to it by Congress, but in the application and interpretation of the powers conferred it exercises judgment and discretion, and it was clearly in the exercise of these that it used the language in the quoted sentences above. If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion. And we may remark in passing that to justify the Commission in the exercise of such authority as is asked, the right to do so should be expressed in clear and certain language. Congress has conferred on the Commission broad powers for the purpose of avoiding discriminations, preferences, and inequalities, and has likewise given it power to regulate the interchange of traffic and the distribution of cars, to revise extortionate exactions under trackage agreements, to enforce the use by one carrier of the terminal facilities of another, and indeed to take all necessary steps to maintain an adequate railway service, but it is going too far to say that all or any of these powers of themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist. The case is, of course, different if the contract either then or subsequently violates a specific law of the United States. Cf. L. & N. R. R. v. Mottley, 219 U. S. 467. In cases in which it does not, it may well be that only the most pressing public necessity would justify the Congress in delegating to an adminis-

trative body jurisdiction to destroy a valid contract and substitute another of its own making, and the Commission would not be justified in assuming Congress had done so except when the authority was clear, for the inviolability of contracts is a cardinal principle of our business and social life. The States are forbidden to pass any law impairing them, and as far back as the ordinances for the government of the Northwest Territory it was stated as a primary principle that in the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force, that shall in any manner whatever interfere with or affect private contracts or engagements bona fide, without fraud, previously made. This is no more than the recognition of a fundamental principle, as true now as then, that contracts, as vesting rights of property, ought to be protected from interfering legislation.

In the petition which appellants filed with the Commission they ask for an investigation of the terminal situation and that the Commission thereafter provide for the use of the terminal by all the railroads on a fair and equi- [fol. 253] table basis. They support the petition by reference to a statute which on the one hand makes it unlawful for a common carrier to give any undue or unreasonable preference to any person, firm, or corporation, and, on the other, authorizes the Commission to require a railroad company to divide its terminal facilities with another. They insist that the provisions are broad enough to require the Commission to modify the terms of the contract and provide a use of the terminals on a different basis of compensation, because, as they claim, the contract they had made for themselves imposed in its operations burdens which in the public interest they should not be required to discharge, and they rely upon L. & N. R. R. v. Mottley, supra, to sustain their position.

But even if we should think the statute may be so construed, it does not follow that this court or any other court can require the Commission to decide the question in that way when it has considered the matter and announced that its own judgment is opposed to that interpretation. In that case its interpretation, right or wrong, is the exercise of judgment and discretion—impregnable to mandamus. If what the Commission had done was to refuse to hear

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the case made by petitioner, or, having heard it, refuse to carry out the plain mandate of the statute, as was the case in Roberts v. U. S., 176 U. S. 221, mandamus would be the proper remedy, but that is not this case, for the Commission did not refuse to hear and to decide; it did both, and an examination of the provisions relied on clearly may not be said by anyone, when considered in the light of appellants' claims, to disclose a positive command. Wilbur v. U. S., 281 U. S. 206, 218-19. The mistake appellants make is that they construe the refusal of the Commission to find in the act authority to do the thing appellants pray may be done, as denial of jurisdiction, whereas the fact is the Commission assumed jurisdiction, heard the evidence, and reached the conclusion that on the facts shown no relief could be given under the provisions of the applicable laws. That this was the construction of a statute is obvious; that the statute from appellants' point of view is not free from doubt is equally obvious; and that action in such circumstances cannot be controlled by mandamus is settled law.

In this view, it follows, without regard to what we may think of the equities, or even whether we would have construed the statute differently, we are without jurisdiction in this proceeding to change the result. The action of the Commission was judicial, and, as the Supreme Court said very recently in a case from us, "errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact." I. C. C. v. U. S., 289 U. S. 385, 393.

The judgment of the Supreme Court of the District is affirmed.

Affirmed.

HITZ, concurring:

I concur in the judgment of the court in this case, but not in all the far-reaching statements and implications of the opinion.

It seems to me clear that the Interstate Commerce Commission took jurisdiction of the questions presented; considered them at length; and decided them by a much divided vote, from which decision so reached no writ of mandamus lies to require a contrary decision.

[fol. 254] But the opinion of the court asserts that the contract seriously impairs the ability of the smaller roads to operate their properties satisfactorily, and I feel constrained to dissent from the view—though based on the Ordinance for the Northwest Territory and the other authorities cited—that a common carrier subject to the provisions of these statutes may contract itself out of the power of the Commission by an arrangement involving so much of its revenue and covering so long a time as to impair or destroy its power to perform its public obligations.

A true copy. Teste:

—— ——, Clerk, Court of Appeals. D. C.

[fol. 255] Monday, May 7th, A. D. 1934.

* * * * * * *

No. 6068, April Term, 1934

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY and the Kansas City Southern Railway Company, Appellants,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Chicago, Rock Island and Pacific Railway Company, et al.

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be and the same is hereby, affirmed.

Per Mr. Justice Groner.

May 7, 1934.

Concurring, Mr. Justice Hitz.

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[fol. 256] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6068

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY and the Kansas City Southern Railway Company, Appellants,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Chicago, Rock Island and Pacific Railway Company, et al., Appellees

DESIGNATION OF RECORD

The Clerk will please prepare a transcript of the record in the above entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry of argument.
3. Opinion of the Court of Appeals.
4. Judgment (or decree) of the Court of Appeals.
5. This designation of record.
6. Clerk's certificate.

Ralph M. Shaw, F. H. Moore, A. F. Smith, F. H. Towner, Counsel for Appellants.

[fol. 257] [Endorsed:] No. 6068. In the United States Court of Appeals for the District of Columbia. The United States of America ex rel. Chicago, Great Western Railroad Company et al., Appellants, vs. Interstate Commerce Commission, et al., Appellees. Designation of Record. United States Court of Appeals for the District of Columbia. Filed Jul. 13, 1934. Henry W. Hodges, Clerk.

[fol. 258] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the United States Court of Appeals for the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 257 inclusive, constitute a true copy of the tran-

script of record and proceedings of said Court of Appeals, as designated by counsel in the case of The United States of America ex rel. Chicago Great Western Railroad Company and the Kansas City Southern Railway Company, et al., Appellants, vs. Interstate Commerce Commission, Atchison, Topeka and Santa Fe Railway Company; The Chicago, Rock Island and Pacific Railway Company, et al., No. 6068, April Term, 1934, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 13th day of July, A. D. 1934.

Henry W. Hodges, Clerk of the United States Court of Appeals for the District of Columbia; by Moncure Burke, Deputy Clerk. (Seal United States Court of Appeals for the District of Columbia.)

[fol. 259] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such wit.

Mr. Justice Brandeis took no part in the consideration or decision of this application.

Endorsed on cover: File No. 38,862. U. S. Court of Appeals, District of Columbia. Term No. 234. The United States of America ex rel. Chicago Great Western Railroad Company et al., Petitioners, vs. Interstate Commerce Commission, Atchison, Topeka and Sante Fe Railway Company, et al. Petition for a writ of certiorari and exhibit thereto. Filed July 28, 1934. File No. 234, O. T., 1934.

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FILE COPY

FILED
JUL 28 1934
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 234

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

RALPH M. SHAW,
F. H. MOORE,
A. F. SMITH,
F. H. TOWNER,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 234

THE UNITED STATES OF AMERICA ex Rel. CHICAGO GREAT WESTERN RAILROAD COMPANY, and THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, and MISSOURI PACIFIC RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Chicago Great Western Railroad Company and The Kansas City Southern Railway Company submit this petition for a writ of certiorari to review a decision of the

United States Court of Appeals for the District of Columbia, and file herewith a certified copy of the entire transcript of the record in said cause and their brief in support of this petition.

Summary Statement of the Matter Involved.

This action originated in the Supreme Court of the District of Columbia with the filing by petitioners of a petition for a writ of mandamus directed to the Interstate Commerce Commission to compel it to take jurisdiction of issues theretofore submitted to it in intervening petitions filed with it by petitioners. The Commission had dismissed petitioners' intervening petitions on the ground, so petitioners claim, that it had no jurisdiction to afford the relief requested or determine the rights of petitioners asserted in those intervening petitions.

The facts out of which the litigation arises are set out in the report of the Commission (R. 94 *et seq.*) and in the decision of the Court of Appeals (R. 245) and may be briefly stated. The Kansas City Terminal Railway Company (hereinafter called the "Terminal Company") is a Missouri corporation organized in 1906 for the purpose of acquiring, constructing and operating a new union station and terminal facilities in Kansas City, Missouri-Kansas, for the benefit of ten trunk line railroads entering the old union station in Kansas City. On June 12, 1909, an operating agreement (R. 17 *et seq.*) was entered into for a term of 200 years, under which agreement each of the ten companies agreed to use the facilities of the Terminal Company and to pay its share of the expenses of said Terminal Company, including taxes and interest and principal on its bonds, when due, as well as the expenses of operating and maintaining the Terminal Company's facilities (R. 25, 26, 31).

It was further agreed that if any using company defaulted in making its payments, the other companies would pay their proportion of the amount in default (R. 26), and the method of apportioning among the using or proprietary companies the amounts to be paid by them was also fixed (R. 25 *et seq.*, 31 *et seq.*). The agreement further provided that the payment of its portion of the Terminal Company's expenses was a condition precedent to the right of any using or proprietary company to use the Terminal Company's facilities (R. 43 *et seq.*). On the same date (June 12, 1909) the same parties executed a stock trust agreement for the same term of 200 years (R. 136 *et seq.*) in which agreement they agreed to carry out the terms and provisions of the operating agreement and pledged their stock as security for such promise.

On January 12, 1910, petitioners herein, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, became parties to the stock trust agreement and the operating agreement through the execution of a supplemental operating agreement (R. 63 *et seq.*) and a supplemental stock trust agreement (R. 162 *et seq.*). At the time of the proceedings before the Commission each of the twelve proprietary companies owned $183,333.33 of stock in the Terminal Company, and there was no other stock outstanding. This condition still obtains.

In conformity with said agreements the Terminal Company issued and sold $50,000,000 of bonds secured by its properties then owned and to be thereafter acquired (R. 240), and then proceeded with the acquisition of the properties necessary for its purposes and the construction and reconstruction of the necessary facilities, which now comprise the new union station and large terminals used for both freight and passenger service. The new station was put in operation in November, 1914.

The operating and supplemental operating agreements require each proprietary company to pay one-twelfth of the taxes of the Terminal Company and one-twelfth of the interest and principal payments due upon its bonds. Under the same agreements, the operating and maintenance expenses of the Terminal Company are paid by the using or proprietary companies on a user basis. All of these amounts, however, are paid to the Terminal Company as compensation for the use of its terminal facilities by each of the owning lines, since that is the only return the owning lines receive for their money. There is some distribution by the Terminal Company among the owning lines of amounts paid as rental by tenants of the union station, but these amounts are inconsequential, as the terminal was constructed to furnish transportation facilities and not as a profit-making venture.

Some of the using or proprietary companies have always made much more use of the Terminal Company's facilities than do other companies. There are four so-called large users and eight so-called smaller users. Under the operating agreement, petitioners, which make very small use of the Terminal Company's facilities (2.61 per cent by the Chicago Great Western and 2.24 per cent by the Kansas City Southern in 1932), each pay one-twelfth of the Terminal Company's interest and taxes, and their share, on a user basis, of the operating expenses of the Terminal Company; while the Atchison, Topeka and Santa Fe Railway Company, for example, made 26.06 per cent of the total use of said facilities in 1932, but still paid only one-twelfth of the taxes and interest charges of the Terminal Company. Exhibit 2 attached to the petition filed in the trial court (R. 84) shows the percentage of use by each using line in 1932, the amounts paid by each on account of interest and taxes of the Terminal Company under the operating agree-

ment and what each line would have paid for interest and taxes on a user basis.

As a result of this distribution of these charges, the cost to petitioners for their use of the Terminal Company's facilities for the year 1932, for example, included $190,836.96 paid by the Chicago Great Western and $190,816.99 paid by the Kansas City Southern on account of interest and taxes, while the amount paid by the Santa Fe on the same account was $195,303.56. Had these charges for interest and taxes been divided on a user basis, the Santa Fe would have paid $599,655.32, the Chicago Great Western $60,057.57, and the Kansas City Southern $51,543.67.

Some time prior to March 10, 1924, the property of the Missouri, Kansas and Texas Railway Company, one of the proprietary companies of the Terminal Company, was sold at foreclosure sale to the Missouri-Kansas-Texas Railroad Company, and this latter company refused to adopt the operating agreement. Its refusal to so adopt the agreement was later upheld by the courts. On March 10, 1924, the Missouri-Kansas-Texas Railroad Company filed with the Commission a petition asking for the entry of an order pursuant to the provisions of paragraph (4) of Section 3 of the Act to Regulate Commerce, according to it the right to use, upon equitable terms, designated portions of the passenger station and other terminal facilities of the Terminal Company. The principal ground of the application was that the terms of the operating agreement were unjust, inequitable and burdensome, in that the companies using the Terminal Company's facilities were required to pay the Terminal Company's interest charges and taxes on a numerical basis.

All of the proprietary companies of the Terminal Company were permitted to file intervening petitions in the proceeding thus instituted. In those petitions, the Terminal

Company and the larger users alleged that the Missouri-Kansas-Texas Railroad Company should not be permitted to use the Terminal Company's facilities except in conformity with the terms of the operating agreement, and the smaller users, including petitioners, alleged that if the Missouri-Kansas-Texas Company were permitted to use the Terminal Company's facilities on terms more favorable than their own, similar relief should be granted them; also that in any event, the terms of the operating agreement were inequitable, unjust, unreasonable, discriminatory and unlawful. They prayed that all the companies using the Terminal Company's facilities should be permitted and required to pay for such use upon a fair, just and equitable basis. The intervening petitions filed by petitioners were attached to the petition filed in the trial court as Exhibit 3 (R. 85 *et seq.*) and Exhibit 4 (R. 87 *et seq.*).

After hearing, the Commission issued a report on November 10, 1925 (R. 94 *et seq.*; 104 I. C. C., R. 203), finding that the Missouri-Kansas-Texas Railroad Company should be permitted to use the facilities of the Terminal Company, but dismissing the intervening petitions of petitioners and the other small users on the ground (as petitioners claim) that it had no jurisdiction under the law to alter the obligations imposed by the operating agreement upon the users of the Terminal Company's facilities. Three members of the Commission dissented from the majority opinion in so far as it refused relief to the smaller users, and expressed the opinion that the tax and interest charges of the Terminal Company should be apportioned upon a user basis, or upon some basis more just and equitable than the numerical basis imposed by the operating agreement (R. 231 *et seq.*).

Nothing further was done in the proceeding before the Commission until March, 1931, when the Missouri-Kansas-

Texas Railroad Company filed an application for further hearing to determine the amount of compensation which it should pay for its use of the Terminal Company's facilities. In April and May, 1931, and before any hearing was had upon the last mentioned application, petitioners filed their petitions in said proceeding praying for a rehearing upon the order dismissing their intervening petitions. Said petitions for rehearing were denied on June 1, 1931.

Thereafter from time to time hearings were had on the application of the Missouri-Kansas-Texas Railroad Company, but the proceeding was still pending when petitioners, on May 31, 1933, filed their petition (R. 2 *et seq.*) in the Supreme Court of the District of Columbia, praying for a writ of mandamus to compel the Commission to set aside its order of November 10, 1925, dismissing petitioners' intervening petitions, and its order of June 1, 1931, denying their petitions for rehearing; and to compel the Commission to hear and decide the issues raised by said intervening petitions upon their merits. On June 7, 1933, the Commission filed its answers (R. 201 *et seq.*).

The Terminal Company, the Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and Missouri Pacific Railroad Company were permitted to intervene (R. 210, 229, 240) as respondents and thereafter filed answers (R. 210 *et seq.*, 229 *et seq.*). Under these answers and a stipulation made upon the hearing in the trial court (R. 240, 241), the essential allegations of fact contained in the petition filed in that court were admitted. Those facts are as set out herein, in the report of the Commission and in the decision of the Court of Appeals.

The cause came on for hearing in the Supreme Court of the District of Columbia on June 22, 1933, on a demurrer

filed that day by petitioners to the answers theretofore filed by respondents. The trial court overruled the demurrer and petitioners electing to stand thereon, an order was entered on June 23, 1933, dismissing petitioners' petition for a writ of mandamus, but allowing an appeal to the United States Court of Appeals for the District of Columbia. The trial court wrote no opinion in the case. The case was thereafter submitted in the Court of Appeals and decided on May 7, 1934. The Court of Appeals affirmed the decision of the trial court, holding that the Commission had actually taken jurisdiction of the proceedings before it; that in the exercise of such jurisdiction it had held it had no authority under the law to do what petitioners desired it to do, and that this action on its part was impregnable to mandamus. Mr. Justice Hitz, while concurring in the judgment of the court, dissented from the view of the other members of the court that the Commission might not have power, in the exercise of jurisdiction, to grant the relief prayed for by petitioners (R. 256).

We should advise this Court that while this case was pending in the lower courts, the Commission promulgated reports dealing with the compensation to be paid by the Missouri-Kansas-Texas Railroad Company for its use of the facilities of the Terminal Company; that in the lower courts some respondents urged that because of the Commission's reports, the case had become moot, and also that the writ should not issue because of the claimed laches of petitioners. The major questions presented, however, are:

First. Was the Court of Appeals correct in deciding that the Commission exercised jurisdiction when it dismissed the petitions filed with it by petitioners?

Second. If the Commission did not so exercise jurisdiction, does it have power under paragraphs (1) and (3) of Section 3 of the Act to Regulate Commerce, upon a proper

record, to order a discontinuance of a discrimination and prejudice found by it to exist, even though such discrimination and prejudice results, as in this case, from the operation of an existing contract?

Third. If the Commission did not so exercise jurisdiction, does it have power under paragraph (4) of Section 3 of the Act to Regulate Commerce to prescribe the terms upon which railroads may use terminal facilities of another railroad, where, as in this case, there is an existing contract permitting such use upon terms specified in such contract?

Reasons Relied Upon for the Allowance of the Writ.

The general reasons relied upon for the allowance of the writ herein are:

(1) In deciding that the Commission had exercised jurisdiction in dismissing petitioners' intervening petitions in the case before it, the Court of Appeals misconstrued and did not give proper effect to applicable decisions of this Court.

(2) In deciding that the Commission had exercised jurisdiction in the case before it, the Court of Appeals conferred an immunity upon the Commission's action not warranted by law and in conflict with previous decisions of this Court.

(3) If, as respondents claim, the Commission did not exercise jurisdiction in dismissing petitioners' intervening petitions in the case before it, the question of whether or not it has the jurisdiction and power claimed by petitioners has not been directly passed upon by this or any other Court, but should be determined. The variety of opinion that now exists with respect to that question is indicated by the differing views thereon expressed by the Justices of the Court of Appeals.

(4) The question of the Commission's jurisdiction and power as presented by petitioners is of great interest to the railroads, and the public interest requires that it be determined as promptly as possible.

WHEREFORE, petitioners pray that this petition for a writ of certiorari may be granted, and that this Court proceed as is provided by law and the rules of this Court in such cases, and that upon final hearing, the judgment of the Supreme Court of the District of Columbia and of the Court of Appeals of said District be reversed.

RALPH M. SHAW,
F. H. MOORE,
A. F. SMITH,
F. H. TOWNER,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 234

THE UNITED STATES OF AMERICA ex Rel. CHICAGO GREAT WESTERN RAILROAD COMPANY, and THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, and MISSOURI PACIFIC RAILROAD COMPANY.

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

This case comes to this Court on a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia. The cause originated in the Su-

preme Court of the District of Columbia with the filing by petitioners of a petition praying for a writ of mandamus requiring the Interstate Commerce Commission (hereinafter called the "Commission") to exercise a jurisdiction claimed to have been conferred upon it by law, but which it had refused to exercise. The Supreme Court of the District of Columbia dismissed the petition and this action was affirmed by the United States Court of Appeals for the District of Columbia.

The report of the Commission upon which the action is based was made on November 10, 1925, and is officially reported at 104 I. C. C. 203. It appears at pages 94 *et seq.* of the printed record. The Supreme Court of the District of Columbia handed down no opinion in dismissing the petition filed with it. The opinion of the Court of Appeals is not yet officially reported but was handed down on May 7, 1934, and appears in the printed record at pages 245 *et seq.* The facts upon which the Commission's report was based are sufficiently set forth in the petition for certiorari filed in this Court and we will not repeat them here.

The petition in the Supreme Court of the District of Columbia was filed on May 31, 1933. After setting out the facts, it alleges that in its report and order of November 10, 1925, the Commission declined to exercise a jurisdiction conferred upon it by law and prays for the issuance of a writ of mandamus to compel the exercise of such jurisdiction. Respondents answered and these answers (R. 201, 210, 229), together with a stipulation made upon the hearing (R. 240, 241) in the Supreme Court of the District admit the essential allegations of fact contained in the petition.

The case came on for hearing in the Supreme Court of the District on June 22, 1933, on a demurrer filed by petitioners to the answers theretofore filed by respondents

(R. 238, 239). The court overruled the demurrer and petitioners electing to stand thereon, an order was entered dismissing the petition but allowing an appeal to the Court of Appeals (R. 239). On May 7, 1934, the Court of Appeals handed down its decision affirming the action of the Supreme Court of the District (R. 245).

ARGUMENT.

I.

The Court of Appeals erred in holding that the Commission had exercised jurisdiction when it dismissed the intervening petitions filed with it by petitioners.

In the Court of Appeals, petitioners necessarily claimed that the Commission had not exercised jurisdiction when it dismissed the intervening petitions filed with it by petitioners, but, that on the contrary, such dismissal constituted a denial of jurisdiction. The Court of Appeals overruled this contention, basing its decision upon its conclusion that the Commission had exercised jurisdiction and that this being so, mandamus was not the appropriate remedy. We submit that what the Commission did and said demonstrates the incorrectness of the conclusion reached by the Court of Appeals.

It is, of course, true that the Commission had held hearings and made a large record before it promulgated its report of November 10, 1925, but the record was made to determine the issues raised by the petition of the Missouri-Kansas-Texas Railroad, and not to determine the issues raised by petitioners. The power of the Commission to determine the issues raised by petitioners had been questioned in a motion to dismiss their intervening petitions. Referring to that issue, the Commission said (R. 113):

> "Controverting respondents' challenge of our power or authority to grant any such relief, the interveners

> contend that we have power under existing law to relieve them of the obligations imposed by the operating agreement."

Speaking of the argument in support of the motion to dismiss, the Commission said (R. 114):

> "The counter contention, that what is asked is the reformation of a contract, involving a power vested exclusively in courts of equity and exercisable only in cases of fraud or mutual mistake, asserts a familiar principle of equity jurisprudence as applied to private contracts, of concern only to the parties thereto."

Summarizing the issue presented to it by the intervening petitions and the motion to dismiss, the Commission then said (R. 114):

> "Whether, then, Congress has or has not appropriately exerted its plenary power directly or through us is a question at the threshold of each case, and it remains here to consider whether the particular power invoked by the interveners has been conferred upon us."

After a discussion of its claimed power under paragraph (4) of Section 3 of the Act to Regulate Commerce, the Commission said (R. 115):

> "The power and authority thus invoked are not conferred by the quoted paragraph."

Discussing its power under Section 15a of the same Act, the Commission said (R. 116):

> "However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. * * * Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act."

After a discussion of paragraphs (1) and (3) of Section 3 of the same Act, the Commission said with respect to them (R. 116):

> "Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation."

Then follows its conclusion, it being said (R. 117):

> "An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee and Alton."

Thus, it definitely appears that the issue raised by the motion to dismiss was stated as being one of power and jurisdiction; that the question which the Commission decided was said to be one of its jurisdiction and power; and that the conclusion stated by it was reached only after a consideration of its jurisdiction and power. In fact, referring to the power claimed for it by petitioners, the Commission said (R. 116):

> "we are unable to find the requested power or authority in any other provision of the act."

Moreover, in reaching its conclusion with respect to the claims of petitioners, the Commission did not consider the facts. On the contrary, it discarded the facts as a basis for its decision, saying with respect to different methods of distributing the charges of the Terminal Company (Rec. 108):

> "No particular purpose would be served by considering them in turn, as the conclusions reached make it

> unnecessary to determine which, if any, embodies an accurate or acceptable formula for division of the charges in question upon a user basis."

We submit that these circumstances definitely show a denial of power and jurisdiction by the Commission. The Court of Appeals held that the Commission did hear and decide, but also said (R. 254):

> "But we think the appellants' position in this respect is grounded upon a mistaken theory. It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask."

It seems to us this statement is inconsistent. A lack of power to order the discontinuance of discrimination asserted by petitioners would seem to be equivalent to a lack of power to hear evidence and decide that the discrimination existed. Otherwise, there might be a determined case of discrimination and prejudice violative of the law, with no power in the Commission to order its removal, presumably because of the existence of the operating agreement with the Terminal Company. Even the Commission, however, held that there was no such virtue in the agreement (Rec. 114).

Again, the Court of Appeals said:

> "If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion."

It seems to us that this is equivalent to saying that the Commission, upon considering the law, concluded that it did not have the power and jurisdiction claimed for it. Such a conclusion when followed by a refusal to act, as in this case, is, we submit, reviewable on mandamus. The

Court of Appeals apparently concluded that the taking of jurisdiction by the Commission for the purpose of deciding that it did not have the claimed jurisdiction made its action impregnable to mandamus. This conclusion overlooks the fact that in every case where there is a denial of jurisdiction, there must necessarily be some hearing by a court or commission to determine the question, and that such action does not constitute a taking of jurisdiction. Thus, in *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474, this Court, in referring to the Commission, said at page 484:

> "It may exercise judgment and discretion, and it may be cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion."

So in this case, it seems clear that the Commission denied its power from what petitioners claim was a misunderstanding of the law; and apparently the Court of Appeals also thought it had denied the power claimed for it.

Nor does the case of *Wilbur* v. *United States*, 281 U. S. 206, 218-219, support the conclusion of the Court of Appeals. In that case the writ was denied because granting it would have operated as a reversal of a decision made by the Secretary of the Interior in the exercise of a discretion conferred upon him by statute. The test to apply here is that laid down in *Interstate Commerce Commission* v. *United States et al.*, 289 U. S. 385, where this Court in denying mandamus said at page 394:

> "If the mandamus were to stand, the result would not be to compel the Commission to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way."

If a writ of mandamus were to issue in this case, it would require the Commission only to adjudicate the merits of the cause presented by petitioners' petitions. It would not require the determination of that cause in any particular way. The Commission would still be free to determine it in any way it (the Commission) thought proper. We submit that in this respect this case is governed by *United States ex rel. Louisville Cement Company* v. *Interstate Commerce Commission*, 246 U. S. 638, and *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Company*, 224 U. S. 474.

In the *Louisville Cement Company* case, *supra*, the Commission concededly took jurisdiction of the Cement Company's claim for reparation and held that the rates assailed were unreasonable to the extent claimed, but further held that since the claim was not filed within two years after some of the shipments were delivered, it had no jurisdiction or power to award reparation with respect to those shipments. Even in the view of the Court of Appeals, that is precisely what happened in the case at bar, for that court in its opinion, referring to the Commission's action, said:

> "It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask."

In the *Humboldt Steamship Company* case, *supra*, substantially the same situation was presented. There the petition by the Steamship Company was to require certain other transportation companies to file tariffs with the Commission. The Commission held hearings as in the case at bar, and decided that it was without jurisdiction to make the order sought by complainant because in construing the Act to Regulate Commerce, it concluded that Alaska was not a territory of the United States. This is

precisely what the Commission did in the case at bar, since it held, upon a consideration of the law, that it was "unable to find the requisite power and authority" to make the order sought by petitioners.

We submit that the Court of Appeals erred in holding that the Commission exercised jurisdiction in making its report of November 10, 1925, in so far as that report dealt with the claims of petitioners.

II.

The Commission had power and authority to consider the claims of petitioners and upon a proper showing to grant the relief requested.

Paragraphs (1) and (3) of Section 3 of the Act to Regulate Commerce (U. S. C. A. Title 49, pp. 158, 195) read as follows:

> "(1) *Undue preferences or prejudices prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

> "(3) *Interchange of traffic.* All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares,

and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

Concededly the purpose of these sections of the Act was to destroy favoritism, prohibit preferences and eliminate every form of discrimination and inequality. *N. Y., N. H. & H. R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361; *Bitterman* v. *Louisville & Nashville R. Co.,* 207 U. S. 205; *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467; *Central Railroad Company of New Jersey* v. *United States,* 257 U. S. 247; *Tap Line Cases,* 234 U. S. 1; *C. I. & L. Ry. Co.* v. *United States,* 270 U. S. 287.

The prohibition of the law against discriminatory and prejudicial practices operates in favor of carriers as well as shippers. *Pennsylvania Company* v. *United States,* 236 U. S. 351, 361; *Louisville & Nashville R. Co.* v. *United States,* 238 U. S. 1, 20; *Baltimore & Ohio Railroad Company* v. *United States,* 264 U. S. 258, 267; *Chicago, Indianapolis & Louisville Railway Company* v. *United States,* 270 U. S. 287; *Tap Line Cases,* 234 U. S. 1, 29. Thus, in the *Tap Line* cases, *supra,* this Court said at page 29 that the Commission "has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantage to particular carriers and shippers." It would seem to follow that if petitioners were able to show that the operating agreement at Kansas City creates a discrimination and prejudice against them because of the expenses imposed upon them as related to the amount of service received, the Commission would have the right and power to require that such discrimination and prejudice be discontinued.

Since the passage of the Transportation Act, 1920, the power of the Commission has been greatly enlarged. That Act introduced a new railroad policy into Federal legisla-

tion, the object of which was to insure adequate transportation service, and the Commission was required to take such steps as might be necessary to insure such service. *Railroad Commission* v. *C., B. & Q. R. Co.*, 257 U. S. 563; *A. C. & Y. R. Co.* v. *United States*, 261 U. S. 184; *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456; *Railroad Commission* v. *Southern Pacific R. Co.*, 264 U. S. 331; *Colorado* v. *United States*, 271 U. S. 153.

Under this rule, excessive expenditures from the common fund in local interest may prejudice interstate commerce. *Colorado* v. *United States*, 271 U. S. 153, 163; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 343. The Commission has exclusive jurisdiction over physical connections between railroads, even though the law does not confer the power in terms. *Alabama & Vicksburg Co.* v. *Jackson & Eastern R. Co.*, 271 U. S. 244, 248. The Commission has exclusive jurisdiction over excessive payments under trackage agreements, and may prohibit them. *Transit Commission* v. *United States*, 289 U. S. 121.

If in this case the operating agreement at Kansas City was shown to be such a burden upon petitioners as to prejudice their interstate commerce, there can scarcely be a doubt of the Commission's right and power to remedy the situation. Its possession of that power has been indicated. *Cincinnati, etc., Ry. Co.* v. *Indianapolis, etc., Ry. Co.*, 36 F. (2d) 323, 325. See also separate opinion of Mr. Justice Hitz in the Court of Appeals (R. 256). It may not be doubted that if the Kansas City terminal facilities were to be built now, the approval of the Commission would be required, both as to construction and financing. It would be odd if there was a complete lack of power in the case at bar merely because the facilities are now in existence and being used.

The existence of the operating agreement would not be a bar to the exercise of such power. Even the Commission

held that the existence of the agreement was no bar to the exercise of jurisdiction by it (R. 114). Certainly that is the law. *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467; *Calhoun* v. *Massie*, 253 U. S. 170; *Interstate Commerce Commission* v. *A., T. & S. F. Ry. Co.*, 234 U. S. 294; *State of New York* v. *United States*, 247 U. S. 591; *Stephenson* v. *Binford*, 287 U. S. 251; *Colorado* v. *United States*, 271 U. S. 153; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 282; *Nebbia* v. *New York*, 291 U. S. 502. Nor are petitioners now estopped in any way by their participation in the operating agreement. *Los Angeles Switching* case, 234 U. S. 294, 312.

Nor would the fact that the operating agreement is pledged under the stock trust agreement and that the Terminal Company has bonds outstanding limit the Commission's power. The bondholders receive their interest and principal payments from the Terminal Company and are not concerned with the contributions by the owning railroads to the Terminal Company. They are only concerned with getting their money, and in this they would be protected by the operating agreement even if all charges of the Terminal Company were distributed on the user basis and petitioners were the only carriers using the terminal facilities.

The Commission apparently thought that petitioners desired it to rewrite the operating agreement (R. 115, 116) and the Court of Appeals seemed to have the same view when it said that it doubted if the law justified the annulment of a valid contract for the use of terminal facilities (R. 254). Petitioners do not desire such a rewriting of the Kansas City operating agreement. Our argument is that the law undoubtedly confers power upon the Commission to prevent or cure prejudice and discrimination and that this power cannot be limited by the agreement. The exact

contention of petitioners was well stated by Commissioner Eastman in his dissenting opinion (R. 129).

It is worthy of note that both the Commission and the Court of Appeals were impressed with the injustice imposed upon petitioners by the Kansas City operating agreement. The Commission suggested the advisability of a reexamination by the participating carriers of all such terminal arrangements, saying that the subject was of such importance to the public, including the railroads, that a reappraisal should be voluntarily undertaken. After quoting this language the Court of Appeals said (R. 253):

> "This suggestion of the Commission that the roads voluntarily amend the contract was obviously the result of the conclusion, inevitable in the circumstances, that the smaller railroads had made an unwise and oppressive agreement which in the light of subsequent events seriously impaired their ability to operate their properties on a satisfactory basis, and there can be no reasonable doubt either of the fact or the result."

The Court of Appeals then pointed out that in 1932 the operation of the agreement cost petitioners approximately $150,000 in excess charges, and further said:

> "No further illustrations are needed to show that the contract according to its terms imposes on the smaller lines payments altogether in excess of benefits received, and we have no reason to doubt that if the contract were now in the making the user basis as applied both to fixed charges and operating expenses would be considered the only fair and reasonable method to adopt."

In view of these conclusions it is indeed difficult to understand how it may be decided that an agreement which "seriously impairs" petitioners' ability to operate their properties on a satisfactory basis is immune from the regulatory authority of the Commission.

What we have said refers to the asserted violations of paragraphs (1) and (3) of Section 3 of the Act to Regulate Commerce. In addition, we contend that the Commission had power to grant the requested relief under Paragraph (4) of Section 3 of the Act (U. S. C. A. Title 49, p. 201). This paragraph was added to the Act by the Transportation Act, 1920, and, in so far as it is pertinent, reads as follows:

> "If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

It may not be doubted that the Commission denied its power and jurisdiction under this paragraph, for with respect thereto it said (R. 115):

> "The power and authority thus invoked are not conferred by the quoted paragraph."

We submit that this was error. The conclusion was apparently reached because petitioners were already entitled to the use of the facilities of the Terminal Company, provided they made the payments and sustained the other obligations imposed by the operating agreement. The reasoning overlooks the fact that the granting by the Commission of a right to use and the fixing of reasonable compensation for such use are of equal importance. The granting of a

right to use would be worthless if a carrier owning terminals had the right to charge such a high rental for the use of such facilities as to prohibit the use. Conversely, the fixing of reasonable compensation would be useless unless the right to use was also granted. Thus, in the case at bar the value of the right to use the facilities of the Terminal Company, granted to petitioners by the operating agreement, is greatly impaired because of the excessive compensation which they are required to pay for such use.

In *C. & A. R. Co.* v. *T., P. & W. R. Co.*, 146 I. C. C. 171, the complaining railroad had been offered the right to use the terminal facilities there involved upon the payment of a compensation which it thought was excessive. The Commission, however, held that it had jurisdiction to grant the right to use and to fix the compensation therefor, even though the only real issue was the amount of compensation. This was also true in the case of *Transit Commission* v. *United States*, 289 U. S. 121. There is now and for years has been disagreement between the Kansas City railroads, including petitioners', as to the compensation to be paid by the proprietary lines for their use of the Terminal Company's facilities. The Commission has construed the law so narrowly as to substantially limit its application and the power of the Commission thereunder; results distinctly not in harmony with the purposes sought to be accomplished by the enactment of the legislation.

III.

Since it had power to do so, it was the duty of the Commission to investigate and determine the merits of the issues presented by petitioners.

Petitioners and respondents are all common carriers subject to the Interstate Commerce Act. Paragraphs (1) and (3) of Section 3 of that Act (U. S. C. A., Title 49, pp. 158, 195) are specific in declaring unlawful the preference, ad-

vantage and discrimination referred to therein and in prohibiting the same. Paragraph (4) of Section 3 (U. S. C. A., Title 49, p. 201) definitely confers upon the Commission power to fix the terms and conditions under which one carrier may use the terminal facilities of other carriers. Paragraph (1) of Section 12 (U. S. C. A., Title 49, p. 368) authorizes and requires the Commission to execute and enforce the provisions of the Act.

Paragraph (1) of Section 13 (U. S. C. A., Title 49, p. 377) authorizes any common carrier to file with the Commission a petition complaining of anything done or omitted to be done by any common carrier subject to the provisions of the Act, in contravention thereof, and further provides that if such complaint is not satisfied, the duty of the Commission is to investigate the matters complained of in such manner as it shall deem proper. Paragraph (1) of Section 14 (U. S. C. A., Title 49, p. 394) makes it the duty of the Commission after investigation to make a report in writing stating its conclusions and its decision in the premises.

Thus, the Commission having jurisdiction, it is plain that the statute is mandatory with respect to the action to be taken by it upon petitioners' intervening petitions filed with it. It had no choice except to receive such petitions, hold appropriate hearings with respect to the issues raised thereby, and after a consideration of the merits, announce its conclusions thereon.

IV.

The case is not moot.

We refer to this matter because it was a defense advanced by some respondents in the lower courts, although not mentioned in the decision of the Court of Appeals. We submit that it may not be held to be an effective defense, although

the Commission has made reports with respect to the issues raised before it by the petitions of the Missouri-Kansas-Texas Railroad. Those reports of the Commission are not final in the sense that a court judgment becomes final. They do not constitute a judgment. The proceeding is always subject to rehearing on petition or on the Commission's own motion and the reports may always be set aside or altered.

Moreover, the rights asserted by petitioners in their petitions to the Commission were peculiar to them, and they are entitled to an adjudication of those rights without respect to what may have been done on the petition of the Missouri-Kansas-Texas. So far as petitioners are concerned, the case is not moot until the question of the Commission's jurisdiction has been determined.

It has been held many times that where an intervening petition in an action at law or equity is dismissed upon the ground that it does not state a cause of action, the intervener may review such judgment on a writ of error. *United States* v. *Northwestern Development Co.*, 203 Fed. 960; *In Re Michigan Central R. R. Co.*, 124 Fed. 727; *Illinois Steel Company* v. *Ramsey*, 176 Fed. 853; *Automobile, etc., Corporation* v. *United States*, 39 F. (2d) 288. The foregoing cases are cited only to show that an intervener has a right to pursue his rights in any case to which he is a party. In *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.*, 288 U. S. 14, this Court sustained the right of the Commission, an intervener in the lower court, to a decision on the merits, although the United States had declined to appeal.

Since this case involves a question of public interest and the Commission has failed to perform its duty on the assumption that it has no jurisdiction, the rights of petitioners should not be foreclosed on the ground that the case has been disposed of on other issues. 4 *C. J.* 576,

Notes 81-82-83, Sec. 2383; *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498; *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290.

V.

Petitioners have not been guilty of laches.

We refer to this point also because it was a defense advanced by some respondents in the lower courts although the Court of Appeals did not refer to it. The answers to the arguments made are numerous. Although the Code of the District of Columbia (Sec. 213, Title 24, part 2, Mandamus) requires all defenses of a defendant to be set up in its answer, no respondent herein set up the defense of laches in the answer filed by it. Laches is essentially a defense and while in some jurisdictions it may not be necessary to set it up in the answer (*Moore* v. *Nickey*, 133 Fed. 289, 293; *Sullivan* v. *Portland*, 94 U. S. 806, 811), it is necessary under the Code of the District of Columbia. Not having been so set up, it should not be available to respondents now as a defense.

Furthermore, the only laches with which petitioners could be charged was the delay from June 1, 1931, when their petitions for rehearing were denied by the Commission (R. 10), to May 31, 1933, when the petition in this case was filed (R. 2). During this period there was no change whatever in the conditions under which the property of the Kansas City Terminal Railway Company was used by petitioners and the railroad respondents (R. 5, 6, 11, 240, 241). The same basis of payment prevails now as in 1925 (R. 241). It follows that no respondent was prejudiced by petitioners' failure to start this suit at an earlier date, and this being so the doctrine of laches has no application.

Mere passage of time does not constitute laches. *Bunch* v. *United States*, 252 Fed. 673, 677, 678; *Spiller* v. *St. L. & S. F. R. Co.*, 14 F. (2d) 284, 288, affirmed 274 U. S. 304; *Kansas City Southern R. Co.* v. *May*, 2 F. (2d) 688, 689; *Southern Pacific Company* v. *Bogert*, 250 U. S. 483, 448-490. No statute of limitations applies to the action which petitioners seek to compel, and this being true, laches has no function. *Bunch* v. *United States, supra; Williamson* v. *Monroe*, 101 Fed. 322; *Broatch* v. *Boysen*, 175 Fed. 702, 707; *Brun* v. *Mann*, 151 Fed. 145, 154.

Petitioners now have and in the past have had a continuing right to a decision by the Commission and under these circumstances the doctrine of laches does not apply. *Amy* v. *City of Galena*, 7 Fed. 163, 166; *United States* v. *Board of Auditors, etc.*, 28 Fed. 407, 409; *Bedgisoff* v. *Cushman*, 12 F. (2d) 667, 668. Since the lapse of time has not prejudiced any party to the litigation other than the small users, the claim of laches should not be sustained. *Chapman* v. *Douglas*, 107 U. S. 348; *Chiswell* v. *Johnston*, 299 Fed. 681, 689; *Spiller* v. *St. L. & S. F. R. Co.*, 14 F. (2d) 284, 288; *Kansas City Southern R. Co.* v. *May*, 2 F. (2d) 688-689.

Laches is an equitable principle which is applied to promote but never to defeat justice. *Bunch* v. *United States*, 252 Fed. 673, 677, 678; *Williamson* v. *Monroe*, 101 Fed. 322, 330; *Spiller* v. *St. L. & S. F. R. Co.*, 14 F. (2d) 284, affirmed 274 U. S. 304; *Kansas City Southern R. Co.* v. *May*, 2 F. (2d) 688, 698; *Brun* v. *Mann*, 151 Fed. 145. If applied here, it will preclude the determination of the Commission's jurisdiction and will deny to petitioners that justice to which they are entitled.

All cases sustaining the defense of laches are distinguishable. In *Arant* v. *Lane*, 249 U. S. 267, *In the Matter of Eastern Cherokees*, 220 U. S. 83, in *Ex Parte American Steel Barrel Company*, 230 U. S. 35, and in *United States*

v. *Blair*, 293 Fed. 847, the defense of laches prevailed only because a contrary rule would have required double payments or would have created what was described in the *Blair* case, *supra*, as "endless and needless confusion" and a defeat of the purposes of the laws involved.

Any delay in starting this action prejudiced only petitioners and those other railroads whose percentage of use of the facilities of the Terminal Company is less than the percentage of payments required to be made by them. Neither the Commission nor any other respondent was damaged thereby. Since laches in an action at law does not constitute a defense; since this action is not subject to any statute of limitations; and since petitioners have done nothing to mislead, deceive or damage any other party; we submit that laches may not control the disposition to be made of the cause. *Thorpe et al.* v. *William Filene's Sons Co.*, 40 F. (2d) 269.

Conclusion.

We submit that upon the conceded facts it ought to be held that the Commission did deny its jurisdiction; that it actually possessed the power and authority which it denied; that the case is not moot and that the defense of laches may not prevail. We submit, therefore, that the petition for certiorari filed herein should be granted in order that the question involved, which is one of large public interest, may be finally determined by this Court.

Respectfully submitted,

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Counsel for Petitioners.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 234.

THE UNITED STATES OF AMERICA *Ex Rel*, CHICAGO GREAT WESTERN RAILROAD COMPANY, and THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

BRIEF FOR PETITIONERS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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No. 234.

THE UNITED STATES OF AMERICA *Ex Rel*, CHICAGO GREAT WESTERN RAILROAD COMPANY, and THE KANSAS CITY SOUTHERN RAILWAY COMPANY.
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

BRIEF FOR PETITIONERS.

MAY IT PLEASE THE COURT:

This case comes to this Court on a writ of certiorari directed to the United States Court of Appeals for the District of Columbia, that Court having affirmed the action of the Supreme Court of the District of Columbia dismissing the petition of petitioners. The action is one by petitioners for a writ of mandamus to compel the Interstate Commerce

Commission (hereinafter called the "Commission") to take jurisdiction of issues raised by intervening petitions filed by petitioners in a case then pending before the Commission and known as its Docket No. 15682, *Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* and to determine the rights of petitioners. The Commission had dismissed petitioners' intervening petitions on the ground, so petitioners claim, that it had no jurisdiction to grant the relief requested or to determine the rights of petitioners asserted in those intervening petitioners. The Commission was the only respondent named by petitioners in their petition filed in the trial court. After the institution of the case, the Kansas City Terminal Railway Company (hereinafter called the "Terminal Company") and the Atchison, Topeka and Santa Fe Railway Company, Chicago, Rock Island and Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and Missouri Pacific Railroad Company were permitted to intervene as respondents.

1. Reference to official report of opinions of lower courts and to reports and orders of the Commission.

This action was started in the Supreme Court of the District of Columbia. In dismissing petitioners' petition, the Supreme Court of the District wrote no opinion, and there is no official report of its decision. The opinion of the United States Court of Appeals for the District of Columbia is officially reported at 71 Fed. Second Series, 336, and appears in the printed record at pages 199 to 211, inclusive. The report of the Commission, as a result of which the action was instituted, is reported at 104 I. C. C. 203, and was accompanied by an order, not officially reported, which dismissed the intervening petitions filed by petitioners with the Commission. The report of the Commission ap-

pears at pages 69 to 119, inclusive, of the printed record, and the order dismissing petitioners' intervening petitions appears at page 119 of the printed record.

2. Statement of the case.

The facts out of which this controversy arises are undisputed and are fully set out in a report of the Commission (R. 69, *et seq.*) and in the opinion of the Court of Appeals (R. 199, *et seq.*). These facts may be briefly stated:

The Terminal Company is a Missouri corporation which was organized in 1906, for the purpose of acquiring, constructing and operating a new union station and terminal facilities in Kansas City, Missouri, and Kansas City, Kansas, for the benefit of ten trunk line railroads entering the old union station in Kansas City. On June 12, 1909, an operating agreement (R. 14, *et seq.*) was entered into for a term of 200 years, under which agreement each of the ten companies agreed to use the facilities of the Terminal Company and to pay its share of the expenses of said Terminal Company, including taxes, and interest and principal on its bonds, when due, as well as the expenses of operating and maintaining the Terminal Company's facilities. (R. 20, *et seq.*)

It was further agreed that if any using company defaulted in making its payments, the other companies would pay their proportion of the amount in default (R. 21), and the method of apportioning among the using or proprietary companies the amounts to be paid by them was also fixed (R. 25, *et seq.*, 31, *et seq.*). The agreement further provided that the payment of its portion of the Terminal Company's expenses was a condition precedent to the right of any using or proprietary company to use the Terminal Company's facilities (R. 34, *et seq.*). Each of the ten trunk lines then owned one-tenth of the capital stock of the Terminal Company. On the same date (June 12, 1909) the same parties executed a stock trust agreement for the same

term of 200 years (R. 120, *et seq.*) in which agreement they agreed to carry out the terms and provisions of the operating agreement and pledged the stock of the Terminal Company held by them as security for such promise.

On January 12, 1910, petitioners became parties to the stock trust agreement and the operating agreement through the execution of a supplemental operating agreement (R. 47, *et seq.*) and a supplemental stock trust agreement (R. 137, *et seq.*). At the time of the proceedings before the Commission each of the proprietary companies owned $183,333.33 of stock in the Terminal Company, and there was no other stock outstanding. This condition still obtains.

In conformity with said agreements the Terminal Company issued and sold $50,000,000 of bonds secured by its properties then owned and thereafter acquired (R. 195), and then proceeded with the acquisition of the properties necessary for its purposes and the construction and reconstruction of the necessary facilities, which now comprise the new union station and large terminals used for both freight and passenger service. The new station was put in operation in November, 1914.

The operating and supplemental operating agreements require each proprietary company to pay one-twelfth of the taxes of the Terminal Company and one-twelfth of the interest and principal payments due upon its bonds. Under the same agreements, the operating and maintenance expenses of the Terminal Company are paid by the using or proprietary companies on a user basis. All of these amounts are paid to the Terminal Company as compensation for the use of its terminal facilities by each of the owning lines, since that is the only return the owning lines receive for their money. There is some distribution by the Terminal Company among the owning lines of amounts paid as rental by tenants of the union station (R. 60), but these amounts are inconsequential, as the terminal was con-

structed to furnish transportation facilities and not as a profit-making venture.

Some of the using or proprietary companies have always made much more use of the Terminal Company's facilities than do other companies. There are four so-called large users and eight so-called smaller users. Under the operating agreement, petitioners, which make very small use of the Terminal Company's facilities (2.61 per cent by the Chicago Great Western and 2.24 per cent by the Kansas City Southern, in 1932), each pay one-twelfth of the Terminal Company's interest and taxes, and their share, on a user basis, of the operating expenses of the Terminal Company; while the Atchison, Topeka and Santa Fe Railway Company, for example, made 26.06 per cent of the total use of said facilities in 1932, but still paid only one-twelfth of the taxes and interest charges of the Terminal Company. Exhibit 2 attached to the petition filed in the Supreme Court of the District (R. 60) shows the percentage of use by each using line in 1932, the amounts paid by each on account of interest and taxes of the Terminal Company under the operating agreement and what each line would have paid for interest and taxes on a user basis.

As a result of this distribution of these charges, the cost to appellants for their use of the Terminal Company's facilities for the year 1932, for example, included $190,836.96 paid by the Chicago Great Western and $190,816.99 paid by the Kansas City Southern on account of interest and taxes, while the amount paid by the Santa Fe on the same account was $195,303.56. Had these charges for interest and taxes been divided on a user basis, the Santa Fe would have paid $599,655.32, the Chicago Great Western $60,057.57, and the Kansas City Southern $51,543.67. In other words, in 1932, the division of interest and taxes under the operating agreement instead of on a user basis saved the Santa Fe $404,351.76, while the excess cost to the Chicago Great Western and Kansas City South-

ern under the operating agreement was $130,779.39 and $139,269.82, respectively.

Sometime prior to March 10, 1924, the property of the Missouri, Kansas and Texas Railway Company, one of the proprietary Companies of the Terminal Company, was sold at foreclosure sale to the Missouri-Kansas-Texas Railroad Company, and this latter company refused to adopt the operating agreement. Its refusal to so adopt the agreement was later upheld by the courts. See *Kansas City Terminal Railway Co.* v. *Central Union Trust Co.*, 294 Fed. 32, certiorari denied, 264 U. S. 588; *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.*, 271 U. S. 445. On March 10, 1924, the Missouri-Kansas-Texas Railroad Company filed with the Commission a petition asking for the entry of an order pursuant to the provisions of paragraph (4) of Section 3 of the Act to Regulate Commerce, according to it the right to use, upon equitable terms, designated portions of the passenger station and other terminal facilities of the Terminal Company. The principal ground of the application was that the terms of the operating agreement were unjust, inequitable and burdensome, because the companies using the Terminal Company's facilities were required to pay the Terminal Company's interest and taxes on a numerical basis.

All of the proprietary companies of the Terminal Company were permitted to file intervening petitions in the proceeding thus instituted. In those petitions, the Terminal Company and the larger users alleged that the Missouri-Kansas-Texas Railroad Company should not be permitted to use the Terminal Company's facilities except in conformity with the terms of the operating agreement, and the smaller users, including petitioners, alleged that if the Missouri-Kansas-Texas Company were permitted to use the Terminal Company's facilities on terms more favorable than their own, similar relief should be granted them; also that in any event the terms of the operating

agreement were inequitable, unjust, unreasonable, discriminatory and unlawful. They prayed that all the companies using the Terminal Company's facilities should be permitted and required to pay for such use upon a fair, just and equitable basis. The intervening petitions filed by petitioners were attached to the petition filed in the trial court as Exhibit 3 (R. 61, *et seq.*) and Exhibit 4 (R. 63, *et seq.*).

After hearings, the Commission issued a report on November 10, 1925 (104 I. C. C. Rep. 203; R. 69, *et seq.*), finding that the Missouri-Kansas-Texas Railroad Company should be permitted to use the facilities of the Terminal Company, but dismissing the intervening petitions of petitioners and the other small users on the ground, as petitioners claim, that it had no jurisdiction under the law to alter the obligations imposed by the operating agreement upon the users of the Terminal Company's facilities. Three members of the Commission dissented from the majority opinion insofar as it refused relief to the smaller users, and expressed the opinion that the charges made by the Terminal Company should be apportioned upon a user basis, or upon some basis more just and equitable than the numerical basis imposed by the operating agreement (R. 104, *et seq.*).

Because of certain questions still unsettled in the Missouri, Kansas and Texas Railway Company foreclosure proceeding, and possibly for other reasons, nothing further was done in the proceeding before the Commission until March, 1931, when the Missouri-Kansas-Texas Railroad Company filed an application for further hearing to determine the amount of compensation which it should pay for its use of the Terminal Company's facilities. In April and May, 1931, and before any hearing was had upon the last mentioned application, petitioners filed their petitions in said proceeding praying for a rehearing upon the order dismissing their intervening petitions. Those petitions for rehearing were denied on June 1, 1931.

Thereafter from time to time hearings were had on the application of the Missouri-Kansas-Texas Railroad Company, but the proceeding was still pending when petitioners, on May 31, 1933, filed their petition (R. 1, *et seq.*) in the Supreme Court of the District of Columbia, praying a writ of mandamus to compel the Commission to set aside its order of November 10, 1925, dismissing petitioners' intervening petitions and its order of June 1, 1931, denying their petitions for rehearing; and to compel the Commission to hear and decide the issues raised by said intervening petitions upon their merits.

On November 13, 1933, while the case was pending in the Court of Appeals, the Commission issued a report on the application of the Missouri-Kansas-Texas Railroad Company for an order fixing the compensation which it should pay for its use of the Terminal Company's facilities. This report appears at 198 I. C. C. 4. Subsequent to the issuance of that report and the entry of an order thereon, the Missouri-Kansas-Texas Railroad Company agreed with the lines owning the stock of the Terminal Company to execute supplemental operating and stock trust agreements, the effect of which would be to restore it as a proprietary line of the Terminal Company and entitle it to use the facilities of the Terminal Company subject to the original operating agreements.

Pursuant to this agreement, the Missouri-Kansas-Texas Railroad Company has filed with the Commission, in Finance Docket No. 10571, an application to continue using the facilities of the Terminal Company and for authority to assume the necessary obligations with respect to its securities; and has also filed in the original case, Docket 15682 an application for an order relieving it from compliance with the report and order made by the Commission therein on November 13, 1933. If these applications are granted, the Missouri-Kansas-Texas Railroad Company will stand in the same relation to the Terminal Company as its prede-

cessor in interest, petitioners, and the other proprietary lines.

3. Proceedings in the lower courts.

Petitioners' petition for mandamus was filed in the Supreme Court of the District of Columbia on May 31, 1933, and appears at pages 1, *et seq.*, of the printed record. That petition set out the proceedings theretofore had before the Commission and alleged that in its report and order of November 10, 1925, the Commission declined to exercise a jurisdiction conferred upon it by law and prayed for the issuance of a writ of mandamus to compel the Commission to set aside its order of November 10, 1925, dismissing petitioners' intervening petitions filed with it, and its order of June 1, 1931, denying petitioners' petitions for rehearing, and to compel the Commission to hear and decide the issues raised by those intervening petitions upon their merits. Attached to the petition as exhibits were copies of the agreements relating to the construction, maintenance and operation of the facilities of the Terminal Company (R. 14, *et seq.;* 120, *et seq.*), the report and order of the Commission made on November 10, 1925 (R. 69, *et seq.*), the intervening petitions filed with the Commission by petitioners (R. 61, *et seq.;* 63, *et seq.*) and a statement showing for the year 1932, the percentage of use made of the Terminal Company's facilities by each using line, the amount of taxes and interest charges of the Terminal Company paid by each using line, the amount which would have been paid by each using line on account of such taxes and interest charges had they been distributed on a user basis, and the increase or decrease in the amount paid which would have resulted had such taxes and interest charges been distributed on the user basis (R. 60).

On June 7, 1933, the Commission filed its answer (R. 157). On June 13, 1933, the Atchison, Topeka and Santa Fe Railway Company; Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company, and Chicago,

Burlington & Quincy Railroad Company were permitted to intervene as respondents (R. 165) and thereafter filed an answer (R. 165, *et seq.*). On June 22, 1933, the Terminal Company was permitted to intervene as a respondent (R. 183) and filed its answer the same day (R. 184, *et seq.*). On the hearing of the cause, the Missouri Pacific Railroad Company was permitted to intervene as a respondent and become a party to the intervening petition and answer theretofore filed by the Atchison, Topeka & Santa Fe Railway Company, *et al.* (R. 195). Under these answers and a stipulation made upon the hearing (R. 195) the essential allegations of fact contained in the petition were admitted. Those facts are as set out herein, in the report of the Commission, and in the decision of the Court of Appeals.

The cause came on for hearing in the Supreme Court of the District of Columbia on June 22, 1933, on a demurrer filed that day by petitioners to the answers theretofore filed by respondents (R. 193). The Court thereupon overruled the demurrer, and, petitioners electing to stand thereon, the Court entered an order on June 23, 1933, dismissing petitioners' petition for a writ of mandamus but allowing an appeal to the Court of Appeals (R. 194). The case was thereafter briefed and argued in the Court of Appeals, and on May 7, 1934, that Court handed down its decision (R. 199, *et seq.*) affirming the action of the Supreme Court of the District. While concurring in the judgment of the Court of Appeals, Mr. Justice Hitz dissented from the view of the majority of the court that the Commission did not have the power and jurisdiction claimed for it by petitioners (R. 210).

4. Proceedings in this Court.

On July 28, 1934, petitioners filed in this Court their petition for a writ of certiorari to the Court of Appeals of the District of Columbia, which petition was granted by an order entered by this Court on October 8, 1934 (R. 215).

SPECIFICATION OF ERRORS.

Petitioners make the following specification of errors:

(1) The Court of Appeals erred in holding that the Interstate Commerce Commission assumed and exercised jurisdiction in dealing with the questions presented to it by petitioners' intervening petitions, and in holding that the Interstate Commerce Commission did not, in dealing with those intervening petitions, base its decision upon a lack of jurisdiction to hear and decide the issues raised thereby. The Interstate Commerce Commission plainly refused to decide the issues presented by petitioners' intervening petitions, basing that refusal upon an alleged lack of power and jurisdiction, and the Court of Appeals erred in failing to so hold.

(2) The Court of Appeals erred in holding that because of the action taken by the Interstate Commerce Commission, the Court was thereby deprived of jurisdiction to grant the writ of mandamus prayed for by petitioners; and in holding that the action of the Interstate Commerce Commission was judicial, and that by reason thereof the Court could do nothing to correct the result produced by the Interstate Commerce Commission's action.

(3) The Court of Appeals erred in failing to hold that the Interstate Commerce Commission refused to exercise its jurisdiction to hear and decide the issues presented to it by petitioners' intervening petitions, and in failing to hold that such refusal could be controlled by mandamus in this case.

(4) The Court of Appeals erred in holding that the Interstate Commerce Commission did not have power and jurisdiction, upon a proper record, to grant the relief requested by petitioners in their intervening petitions presented to the Commission.

SUMMARY OF ARGUMENT.

(1) The question of whether or not the Commission exercised jurisdiction when it dismissed the intervening petitions filed with it by petitioners is one to be determined upon a consideration of the situation existing when the order of dismissal was made, the matters taken into consideration by the Commission before it entered its order and the language it used in stating the conclusions reached by it. A consideration of these matters compels the conclusion that in dismissing those intervening petitions the Commission denied its power and jurisdiction to consider on their merits the issues presented thereby and that in any case, it only took such jurisdiction as was necessary for it to decide that it did not have power and jurisdiction to decide the issues upon the merits.

(2) If the Commission had the power and jurisdiction claimed for it, its manifest duty was to determine the merits of the issues presented to it by petitioners' intervening petitions upon their merits. Instead of so doing, it held that it did not have the power and jurisdiction invoked. Under these circumstances mandamus was the proper method of enforcing petitioners' rights. Any denial by the Commission of a power vested in it by the Interstate Commerce Act is subject to correction through mandamus.

(3) The Commission had the power and jurisdiction to consider and determine the merits of the issues presented to it by the intervening petitions of petitioners for the following reasons:

(a) That power is specifically conferred upon the Commission by paragraphs 1 and 3 of Section 3 which prohibit every form of discrimination and prejudice and grant to the Commission power to deal therewith. One claim made to the Commission was that the situation existing under the operating agreement relating to the use of the facilities of the Terminal Company was that it was discriminatory against and prejudicial of the rights of petitioners.

(b) The Commission also had the suggested power under paragraph 4 of Section 3 of the Interstate Commerce Act since under that part of the law, the right to fix the fair compensation to be paid for the use of terminal facilities by a railroad not owning them is coordinate with and a part of the power to require such use.

(c) The Commission also had the suggested power under other sections of the Interstate Commerce Act. The existing situation demonstrates not only a prejudice and discrimination against petitioners, but the imposition upon it of undue burdens upon their interstate commerce. The prevention and removal of such burdens is one of the Commission's most important functions and jurisdiction to that end inheres in almost every section of the Act conferring power and authority upon the Commission.

(d) The character of relief sought by petitioners before the Commission confirms the suggested jurisdiction and power of the Commission, since the undisputed facts show that the payments which petitioners are now required to make for their use of the facilities of the Terminal Company constitute not only a prejudice of and discrimination against them but also an undue burden upon their interstate commerce.

(e) The existence of the operating agreement under which petitioners make the payments now required of them for their use of the facilities of the Terminal Company does not and cannot affect the power of the Commission to deal with such payments. No violation of the Interstate Commerce Act is rendered immune from the regulatory authority of the Commission merely because it results from the operation of a preexisting contract.

(f) The status of petitioners as stockholders of the Terminal Company does not and cannot limit the power of the Commission since all payments made by petitioners to the Terminal Company are paid as compensation for their use of the facilities of the Terminal Company, and not because of their status as stockholders of that company.

(g) The exercise of jurisdiction by the Commission will not adversely affect any public interest. The holders of securities issued by the Terminal Company are not and cannot be interested in the sources from which that company draws the revenue with which to meet its obligations. Petitioners have never asked for any order which would affect or impair in any way the obligations of the Terminal Company to the holders of its securities.

(4) Petitioners have not been guilty of such laches as would require a denial of the writ prayed for. The disposal of the case on the ground of laches would deny to petitioners that determination with respect to the Commission's jurisdiction to which they are entitled. In any case, any delay of which petitioners may have been guilty, has not damaged any party to the proceeding except themselves, and since there is involved a question of public interest, the defense of laches may not prevail.

(5) The case is not moot because of the entry of an order by the Commission in the proceeding pending before it upon the application of Missouri-Kansas-Texas Railroad Company. Petitioners are still entitled to a determination of the issues presented by their petitions filed with the Commission. Any order made by the Commission in the proceeding before it is not final in the sense that a court judgment is final and the case cannot, therefore, be said to be moot merely because the Commission has made an order with respect to one branch of the case pending before it.

ARGUMENT.

I.

The Court of Appeals erred in holding that the Commission had exercised jurisdiction when it dismissed the intervening petitions filed with it by petitioners.

In the Court of Appeals, petitioners necessarily claimed that the Commission had not exercised jurisdiction when it dismissed the intervening petitions filed with it by petitioners, but that on the contrary, such dismissal constituted a denial of jurisdiction. The Court of Appeals overruled this contention.

Whether or not it was right in thus construing what the Commission had done must be decided upon a consideration of the circumstances and what was said and done by the Commission. It is true, as stated by the lower court (R. 210), that the Commission held hearings and made a large record in the case pending before it prior to the issuance of its report of November 10, 1925, but that record was made to determine the issues raised by the petition of the Missouri-Kansas-Texas Railroad and not to determine the issues raised by petitioners.

At the time its report was made, the situation before the Commission, insofar as it related to petitioners' intervening petitions, was that those petitions had been filed with the Commission and the power of the Commission to grant the relief therein requested had been questioned in a motion to dismiss the petitions (R. 72). The specific issue which the Commission was called upon to decide, so far as petitioners' intervening petitions were concerned, was whether or not it had the power to do what was requested. Referring to that issue, the Commission said (R. 92):

> "Controverting respondents' challenge of our power or authority to grant any such relief, the interveners contend that we have power under existing law to relieve them of the obligations imposed by the operating agreement."

Speaking of the argument in support of the motion to dismiss, the Commission said (R. 93):

> "The counter contention, that what is asked is the reformation of a contract, involving a power vested exclusively in courts of equity and exercisable only in cases of fraud or mutual mistake, asserts a familiar principle of equity jurisprudence as applied to private contracts, of concern only to the parties thereto."

Summarizing the issue presented to it by the intervening petitions and the motion to dismiss, the Commission then said (R. 94):

> "Whether, then, Congress has or has not appropriately exerted its plenary power directly or through us is a question at the threshold of each case, and it remains here to consider whether the particular power invoked by the interveners has been conferred upon us."

After a discussion of its claimed power under paragraph (4) of Section 3 of the Act to Regulate Commerce, the Commission said (R. 95):

> "The power and authority thus invoked are not conferred by the quoted paragraph."

Discussing its power under Section 15a of the same Act, the Commission said (R. 96):

> "However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. * * * Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act."

After a discussion of paragraphs (1) and (3) of Section 3 of the same Act, the Commission said with respect to them (R. 96):

> "Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation."

Then follows its conclusion, it being said (R. 97):

> "An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee tnd Alton."

Thus, it definitely appears that the issue raised by the motion to dismiss was one of the Commission's power and jurisdiction; that the question which the Commission decided was said by it to be one of its jurisdiction and power; and that the decision made by the Commission was made only after a consideration of its jurisdiction and power. In fact, referring to the power claimed for it by petitioners, the Commission said (R. 96):

> "We are unable to find the requested power or authority in any other provision of the Act."

The Court of Appeals found that the Commission had heard evidence and on the facts shown had reached the conclusion that the relief asked could not be granted (R. 210). We submit that this is not so. As we have said the hearings had and record made were necessary to a consideration of the issues raised by the Missouri-Kansas-Texas Railroad. None of those facts were discussed or weighed by the Commission in its consideration of the motion to dismiss petitioners' petitions. What the Court of Appeals held with respect to this point may best be shown by a reference to what is said in its opinion. In discussing what the Commission had done and referring to the statements made by the Commission, and which we have quoted, the Court said (R. 208):

> "It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask. The Commission is an administrative body and can exercise only the powers delegated to it by Congress, but in the application and interpretation of the powers conferred it exercises judgment and discretion, and it was clearly in the exercise of these that it used the language in the quoted sentences above. If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion."

Further dealing with the action actually taken by the Commission, the Court said (R. 209, 210):

> "If what the Commission had done was to refuse to hear the case made by petitioners, or, having heard it, refused to carry out the plain mandate of the statute, as was the case in *Roberts* v. *United States*, 176 U. S. 221, mandamus would be the proper remedy, but that is not this case, for the Commission did not refuse to hear and to decide; it did both, and an examination of the provisions relied on clearly may not be said by anyone, when considered in the light of appellants' claims, to discose a positive command. *Wilbur* v. *United States*, 281 U. S. 206, 218-19. The mistake appellants make is that they construe the refusal of the Commission to find in the act authority to do the thing appellants pray may be done, as denial of jurisdiction, whereas the fact is the Commission assumed jurisdiction, heard the evidence, and reached the conclusion that on the facts shown no relief could be given under the provisions of the applicable laws."

We submit that the conclusion reached by the Court of Appeals was plainly wrong in view of what the Commission actually said and did, and that an analysis of the Court's opinion so shows. The statement that the Commission, in using the language it did, found that it had no legislative authority to do what petitioners asked, instead of holding

that it had no jurisdiction to hear and and decide, seems to us to be inconsistent. A lack of power to order the discontinuance of a law violation would seem to be equivalent to a lack of power to hear evidence and decide whether the violation did or did not exist. If this is not so, there might be an ascertained case of law violation, with no power in the Commission to order its discontinuance. It follows that if the Commission actually held that it had no authority to do what petitioners asked, as the Court of Appeals says it held, that holding amounted to a decision that it did not have the necessary power and jurisdiction. One holding would be the same as the other, but in different words.

Again, the statement of the Court of Appeals (R. 208) that if the Commission had the power claimed for it, it got it only from statute and that it was by looking to the statute and its limitations that the Commission reached the conclusion it did, seems to us to be equivalent to a statement that the Commission, upon a consideration of the law, concluded that it did not have the power and jurisdiction claimed for it. It follows that if the Commission exercised judgment, as stated by the Court of Appeals, it only exercised that judgment to determine that it did not have power and jurisdiction under the law to decide upon their merits the issues raised by petitioners.

Again, we submit that the statement of the Court of Appeals that the Commission assumed jurisdiction but concluded that no relief could be granted petitioners under the applicable law, amounts to a statement that the Commission took jurisdiction in order to determine whether or not it had jurisdiction to deal with the merits of the issues presented, and after a consideration of the law, decided that it did not have the necessary power. We submit that the taking of jurisdiction by the Commission, for the purpose of holding that it did not have power to deal with the issues on their merits, is not an action by the Commission which is impregnable to mandamus.

In every case where there is a denial of jurisdiction, as there was here, there must necessarily be some hearing by a court or commission to determine the question, and such a hearing does not constitute the taking of jurisdiction. Thus, in *Interstate Commerce Commission* v. *Humboldt Steamship Company*, 224 U. S. 474, this Court, in referring to the powers and duties of the Commission, said at page 484:

> "It may exercise judgment and discretion, and it may be cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion."

In this case we submit that it is clear the Commission denied its power from what petitioners assert was a misunderstanding of the law, and upon analysis of its opinion, it would seem this was the view held by the Court of Appeals. If so, the conclusion of that Court that the action of the Commission could not be corrected through mandamus was certainly wrong.

That the Commission did deny its jurisdiction to grant the relief requested by petitioners is conceded in the answers filed by all the intervening respondents. Only in the answer of the Commission is there any statement that this is not so.

In that document it is said (R. 162) that the Commission did consider and determine upon the merits the asserted violations of paragraphs (1) and (3) of the Interstate Commerce Act and found that no such violations had been shown or established. This claim must be based upon that discussion of those paragraphs where the Commission said (R. 96):

> "Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered

and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation."

Certainly, this language does not constitute a decision on the merits. The words used negative such a conclusion, for they constitute a statement by the Commission that it did not decide it had the power claimed for it. Any claim that the language demonstrates a taking of jurisdiction cannot be reconciled with the Commission's previous statements that it was considering only the question of its power (R. 94), and that it was unable to find in any provision of the Act the requisite power and authority to deal with the issues presented by petitioners' intervening petitions (R. 96).

We submit that under the foregoing, there is no support for the conclusion that the Commission exercised any jurisdiction whatsoever in dismissing petitioners' intervening petitions. Every circumstance compels the conclusion that what the Commission did in sustaining the motion to dismiss petitioners' intervening petitions was to hold that it had no power or jurisdiction to grant the relief requested by petitioners; all without regard to whether or not the facts justified the granting of such relief.

II.

If the Commission had the power and jurisdiction claimed for it, its duty was to investigate and determine the merits of the issues presented to it by petitioners' intervening petitions. Since it declined to do so, mandamus is the proper remedy to enforce petitioners' rights. The Court of Appeals erred in failing to so hold.

Argument in support of this proposition is presented on the assumption of the Commission's jurisdiction, the existence of which we shall hereafter demonstrate. As we have shown, the Commission actually did deny its power,

but if it had the power claimed for it, its duty in the premises was clear.

Petitioners and the intervening respondents are all common carriers subject to the Interstate Commerce Act. Paragraphs (1) and (3) of Section 3 of that act (U. S. C. A., Title 49, pp. 158, 195) are specific in declaring unlawful the preference, advantage and discrimination referred to therein, and in prohibiting the same.

Paragraph (4) of Section 3 (U. S. C. A., Title 49, p. 201) is definite in conferring upon the Commission power to fix the terms and conditions under which one carrier may use the terminal facilities of other carriers. Paragraph (1) of Section 12 (U. S. C. A., Title 49, p. 368) authorizes and directs the Commission to execute and enforce the provisions of the Act. Paragraph (1) of Section 13 (U. S. C. A., Title 49, p. 377) authorizes the filing with the Commission by any common carrier of a petition complaining of anything done or omitted to be done by any common carrier subject to the provisions of the Act, in contravention of the provisions thereof and concludes as follows:

> "If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

And in conclusion, paragraph (1) of Section 14 (U. S. C. A., Title 49, p. 394) imposes upon the Commission the duty, after investigation, of making a report in writing with respect thereto, which report shall state its conclusions and its decision in the premises.

In view of the foregoing, it may not be denied that if it had the power claimed, the duty of the Commission in this case was mandatory. It had no alternative other than to receive the intervening petitions of petitioners, investigate and consider the matters therein set out, and decide

such matters upon the merits as developed by the evidence. Instead of doing this, the Commission dismissed the petitions upon a finding that it did not have jurisdiction to deal with them as the law would have otherwise required it to deal.

Under these circumstances, mandamus is unquestionably the proper remedy, and indeed, it is the only remedy available to petitioners. That this is so is now definitely settled by the decisions of this Court in *Interstate Commerce Commission* v. *Humboldt Steamship Company,* 224 U. S. 474, 484, 485; *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, 642, 643; *Kansas City Southern Railway* v. *Interstate Commerce Commission,* 252 U. S. 178, 187; and *Interstate Commerce Commission* v. *Los Angeles,* 280 U. S. 52. The same rule has been applied in the Court of Appeals for the District of Columbia. *Blair* v. *United States, ex rel. Union Pacific R. Co.,* 6 Fed. (2d) 484, 486; *United States* v. *Board of Tax Appeals,* 16 Fed. (2d) 337, 339; *United States* v. *Interstate Commerce Commission,* 34 Fed. (2d) 228.

The rule is stated in the *Louisville Cement Company Case, supra,* in which this Court said at pages 642 and 643:

> "That the Supreme Court of the District of Columbia, in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction is decided in *Interstate Commerce Commission* v. *Humboldt Steamship Co.,* 224 U. S. 474. If the Commission did so err, on the authority of many decisions, among them *Ex parte Russell,* 13 Wall. 644; *Ex parte Schollenberger,* 96 U. S. 369; *Hollon Parker, Petitioner,* 131 U. S. 221; *In re Grossmayer,* 177 U. S. 48, and *Interstate Commerce Commission* v. *Humboldt Steamship Co.,* 224 U. S. 474, 485, the courts may correct such error on a petition for mandamus, where, as in this case, the erroneous decision cannot be reviewed on appeal or writ of error."

We are aware of those cases in which it has been held that mandamus cannot be had to require a particular exercise of judgment or discretion, jurisdiction having been assumed and a decision on the merits having been made. *Interstate Commerce Commission* v. *Campbell,* 289 U. S. 385; *Work* v. *Rives,* 267 U. S. 175; *United States* v. *Interstate Commerce Commission,* 8 Fed. (2d) 901, 902; *United States* v. *Interstate Commerce Commission,* 11 Fed. (2d) 554, 556; *Bartlesville Zinc Co.* v. *Interstate Commerce Commission,* 30 Fed. (2d) 479, 480; *United States* v. *Mellon,* 41 Fed. (2d) 119, 120; *Southern Transportation Company* v. *Commission,* 47 Fed. (2d) 411, 413; *United States* v. *Interstate Commerce Commission,* 51 Fed. (2d) 429, 431; *Southern Transportation Co.* v. *Interstate Commerce Commission,* 61 Fed. (2d) 925.

In this case, however, there has been no decision on the merits of petitioners' claims. Nor do petitioners ask this Court to direct the Commission to decide the issues presented to it in any particular way. All they request is an order requiring the Commission to consider those issues on their merits and decide them in some way. Even in the cases last cited, however, it has been uniformly held that mandamus will issue to compel a performance of duty. Thus, in *Interstate Commerce Commission* v. *Campbell,* 289 U. S. 385, this Court said at page 394:

> "If the Commission had declined to listen to the claim for reparation, or finding reparation due had declined to order payment, mandamus might have been available to hold it to its duty * * *. Mandamus is an appropriate remedy to compel a judicial officer to act."

In its opinion, the Court of Appeals did not hold that the rule of law was otherwise, but avoided the effect of the rule by a holding that the Commission had exercised its judgment and discretion in such a way as to make the rule inapplicable. The Court did not go so far as to say that

the Commission had determined the merits of petitioners' claims. On the contrary, it said that the judgment exercised by the Commission led it to conclude that it had no "legislative authority" to do what petitioners asked (R. 208); that by "looking to the statute and its limitations" the Commission decided it had no power to change the contract (R. 208).

Again, after some discussion of the Commission's power in the premises, the Court further said (R. 209):

> "But even if we think the statute may be so construed, it does not follow that this court or any other court can require the Commission to decide the question in that way when it has considered the matter and announced that its own judgment is opposed to that interpretation. In that case, its interpretation, right or wrong, is the exercise of judgment and discretion—impregnable to mandamus."

It seems to us that the foregoing statements mean only that the Commission, after a consideration of the law, concluded that it did not have power to deal with the merits of the issues presented by petitioners, and that its decision cannot be corrected by mandamus. We submit that in so holding, the lower court was clearly wrong.

In the *Humboldt Steamship Company Case,* 224 U. S. 474, the Commission received a petition and then held that the statute under which relief was claimed did not authorize it to exercise jurisdiction. But this Court held that a writ should issue to compel the Commission to exercise its jurisdiction, saying (p. 484) that a denial of power was not an exercise of jurisdiction. In the *Louisville Cement Company Case,* 246 U. S. 638, the Commission took jurisdiction of a claim for reparation and held that the rates assailed were unreasonable, but declined to grant full reparation because of the construction placed by it upon the law. In both of these cases, the Commission decided that it did not have the "legislative authority" and "requisite power" to grant the relief requested; yet mandamus was granted. It would

seem that in this case, where the Commission did precisely the same thing, according to the Court of Appeals, the same result should follow.

Reference is made by the lower court (R. 210) to *Wilbur* v. *United States,* 281 U. S. 206, but we submit that the case is not in point. The situation there was that the Secretary of the Interior had exercised a discretion, conferred upon him by statute, in determining who should be enrolled as members of an Indian tribe. The granting of the writ would have constituted the Court as the judge of who should be enrolled, and would have required the Secretary to exercise his discretion in a certain way in order to produce a result thought by the Court to be proper.

That is not the situation in the case at bar, for petitioners do not ask that the Commission be required to exercise its discretion in any certain way. They only ask for a hearing and a decision on the merits of the issues presented by them to the Commission. Other cases similar to the *Wilbur Case, supra,* are *Ness* v. *Fisher,* 223 U. S. 683, 691; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549, 555; *United States* v. *Wilber,* 283 U. S. 414; *Interstate Commerce Commission* v. *N. Y., N. H. & H. Ry. Co.,* 287 U. S. 178, and *B. A. & P. Ry. Co.* v. *United States,* 290 U. S. 127, 142. In all these cases, mandamus was refused because there had been an exercise of jurisdiction. In the *Campbell Case,* 289 U. S. 385, cited in the opinion of the lower court (R. 210), the action of the Commission complained of was its finding that it could not award damages because of insufficient proof. None of these cases are in point. The test to apply here is the test laid down by this Court in the *Campbell Case, supra,* at page 394, where it was said:

> "If the mandamus were to stand, the result would not be to compel the Commission to adjudicate the cause, for that it has already done; the result would be to compel adjudication in a particular way."

If a writ of mandamus were to issue in ths case, it would only require the Commission to adjudicate the merits of the issues presented in petitioners' intervening petitions. The Commission, however, would still be free to determine the merits of the cause in any way it thought proper.

The decision of the lower court confers immunity upon the Commission's decision, although it is apparently held that the Commission only went so far as to conclude that it had no power to deal with the merits of the issues presented. We submit that this holding was erroneous; that the case at bar is controlled by the decisions of this Court in the *Humboldt Steamship Company Case, supra,* and the *Louisville Cement Company Case, supra;* and that if the Commission actually had the power and jurisdiction claimed for it, its action in denying that jurisdiction is not impregnable to mandamus.

III.

The Commission had power and jurisdiction to consider and determine upon the merits the issues presented to it by the intervening petitions of petitioners.

The intervening petitions filed with the Commission by petitioners (R. 61, *et seq.;* 63, *et seq.*) alleged in substance that the division of the taxes and interest charges of the Terminal Company upon the numerical basis, as provided by the operating agreement, was unjust, inequitable, prejudicial, discriminatory and contrary to public interest, in violation of the Interstate Commerce Act. The granting of relief to petitioners would have required an entry of an order by the Commission fixing a basis for the payment of such compensation, as between the using carriers, different from the basis prescribed by the operating agreement, and the Commission held it had no power or authority to make such an order. The same conclusion was reached by the Court of Appeals, for that Court, after a statement of the powers of the Commission, said (R. 208):

> "but it is going too far to say that all or any of these powers of themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist."

Mr. Justice Hitz dissented from this conclusion of the Court of Appeals, saying (R. 211):

> "I feel constrained to dissent from the view * * * that a common carrier subject to the provisions of these statutes may contract itself out of the power of the Commission by an arrangement involving so much of its revenue and covering so long a time as to impair or destroy its power to perform its public obligations."

Petitioners assert in this Court that the Commission did and does have jurisdiction, upon a proper record, to make an order granting the relief requested. Several matters are pertinent to a consideration of the Commission's power and in order that this Court may have a clear understanding of our position on the subject, we shall deal with these matters in order.

1. PARAGRAPHS (1) AND (3) OF SECTION 3 OF THE INTERSTATE COMMERCE ACT CONFER UPON THE COMMISSION POWER AND JURISDICTION TO CONSIDER THE MERITS OF THE ISSUES PRESENTED BY PETITIONERS IN THEIR INTERVENING PETITIONS, AND REACH A DECISION WITH RESPECT THERETO.

The matter of the Commission's jurisdiction in this case is dealt with rather fully in the dissenting opinion written by Commissioner Eastman (R. 104, *et seq.*). That jurisdiction seems to us to be plain from a consideration of the law itself and the decisions of this Court construing it. Paragraph (1) of Section 3 of the Interstate Commerce Act (U. S. C. A., Title 49, p. 158) reads as follows:

> "*Undue preference or prejudice prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or

> unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject and particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in ay respect whatsoever."

Paragraph (3) of Section 3 (U. S. C. A., Title 49, p. 195) reads as follows:

> "*Interchange of traffic.* All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

These sections of the Act may be considered together. Their purpose was to destroy favoritism, prohibit preferences and eliminate every form of discrimination and inequality. *N. Y., N. H. & H. R.R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361; *Bitterman* v. *Louisville & Nashville R. Co.,* 207 U. S. 205; *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467; *Central Railroad Company of New Jersey* v. *United States,* 257 U. S. 247; *Tap Line Cases,* 234 U. S. 1.

In the last case above cited this Court said (p. 29) that the Commission "has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantage to particular carriers and shippers." It is thus plain that the prohibition of the act

against discrimination, preferences and inequalities operates in favor of carriers as well as shippers.

In other cases the holdings have been still more specific in condemning prejudice and discrimination against carriers. Thus, in *Pennsylvania Company* v. *United States,* 236 U. S. 351, the facts were that the Pennsylvania Company was performing service upon its terminals at New Castle, Pennsylvania, for certain carriers, but declined to do so for the Buffalo, Rochester & Pittsburgh Railway Company, the complainant before the Commission. The order of the Commission required the removal of the discrimination. Quoting paragraphs (1) and (3) of Section 3 of the Interstate Commerce Act as they then stood, this Court said at page 361:

> "This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact. *Texas & Pacific R. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland R. Co.,* 168 U. S. 144, 170."

In accordance with this construction of the law, this Court upheld the Commission's conclusion that there had been a discrimination against the Buffalo, Rochester & Pittsburgh Railway Company. In the case cited, the principal attack upon the order of the Commission was based upon the argument that the order required the Pennsylvania Company to give up the use of its terminals to another company, Section 3 of the act then prohibiting such a requirement. The section has since been amended so that this prohibition is no longer in the act, paragraph (4) of Section 3 conferring upon the Commission specific power to require the giving of such use.

In *Louisville & Nashville R. Co.* v. *United States,* 238 U. S. 1, a similar order by the Commission finding discrim-

ination as between common carriers in the use of terminals and requiring its removal was again upheld, this Court saying at page 20:

> "In this case the controlling feature of the Commission's order is the prohibition against discrimination."

In *Baltimore & Ohio Railroad Company* v. *United States,* 264 U. S. 258, the action was by twelve eastern railroads to set aside an order of the Commission permitting the New York Central to acquire control of terminal facilities operated by the Chicago River & Indiana Railroad Company and the Chicago Junction Railroad Company in Chicago. In sustaining the right of the plaintiffs to maintain the action and in dealing with possible loss which might be inflicted upon them as a result of the acquisition, this Court said at page 267:

> "It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. *Pennsylvania Co.* v. *United States,* 236 U. S. 351."

In *Chicago, Indianapolis & Louisville Railway Company* v. *United States,* 270 U. S. 287, the action was to set aside an order of the Commission finding discrimination against the Chicago, Lake Shore & South Bend Railway Company, in connection with terminal service furnished at South Bend, Indiana. In that case no argument was made that the Commission did not have power to order the discrimination and preference removed if they were found to exist in fact. Having found that the evidence justified the order, this Court sustained it.

It has been argued that paragraph (1) of Section 3 of the Act only covers the relations between carriers and shippers, but the words of the paragraph do not support the claim. The paragraph prohibits any common carrier giving any undue preference or advantage to any corpora-

tion. The Terminal Company is a common carrier subject to the Act and petitioners are certainly corporations. With respect to paragraph (3) of Section 3 it has only been said that the power claimed for the Commission has not been specifically conferred, and is so far-reaching in its nature that it cannot be inferred. This paragraph has not been changed since its enactment. It definitely prohibits a discrimination in rates, fares and charges as between common carriers subject to the Act. Petitioners alleged such a discrimination in their intervening petitions filed with the Commission and thus evoked a jurisdiction as old as the Act itself.

No one could contend that if the discrimination and prejudice alleged existed in fact the Commission would not have power to prohibit it. That power has been exercised so many times that it must now be beyond dispute. Thus, there would be nothing new or startling in the exercise of jurisdiction as requested by petitioners. The purpose of the Interstate Commerce Act, as announced in the decisions of this Court, was to eliminate every form of discrimination, preference and inequality. There is no exception of discrimination and inequality resulting from the operation of contracts for the use of terminal facilities. As stated by this Court in the *Transit Commission v. United States*, 289 U. S. 121, 125, the Commission has declared that,

> "the reasonableness of a joint facility rental is a matter of public interest, as well as one affecting the operations of the carriers."

A denial of the Commission's jurisdiction in this case under paragraphs (1) and (3) of Section 3 of the Act creates an exception not contained in the statute and limits the application of the law to a field much narrower than this Court has said it occupies.

2. UNDER PARAGRAPH (4) OF SECTION 3 OF THE INTERSTATE COMMERCE ACT THE COMMISSION ALSO HAS THE POWER AND JURISDICTION CLAIMED FOR IT.

The jurisdiction claimed for the Commission by petitioners also appears to be definitely granted by the language of paragraph (4) of Section 3 of the Interstate Commerce Act (U. S. C. A. Title 49, p. 201). That paragraph, insofar as it is pertinent, read as follows:

> "If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

The paragraph was added to the Interstate Commerce Act by the Transportation Act, 1920. With respect to its jurisdiction thereunder, the Commission said (R. 94):

> "The primary power to be exercised is to 'require the use' of the terminals, which power the further power to fix the compensation in appropriate circumstances merely supplements. The requirement is to be laid upon a carrier then 'owning or entitled to the emjoyment' of the facilities and for the benefit of 'another carrier' or 'other carriers'; in other words, to be laid upon a carrier owning or by lease or otherwise entitled to present enjoyment and for the benefit of a carrier or carriers not so owning or entitled.
>
> "Obviously, the interveners are not in the latter situation."

Applying this theory, the Commission then held that because petitioners had a right to use the facilities of the Terminal Company, provided they made the payments required by the operating agreement, it could do nothing in the way of affording them any relief, even though the facts might justify it. We submit that this was wrong.

Under paragraph (4) of Section 3 the Commission is given two powers: (1) to compel a carrier owning terminal facilities to permit another carrier to use those facilities; (2) to fix the terms for such use. The courts have held that the powers of the Commission are to be broadly construed to enable carriers to operate efficiently and economically. In such circumstances it is not reasonable to assume that the power to compel the use of terminal facilities and the power to fix the compensation to be paid therefor are to be narrowly construed, or that the Commission can act only in cases where it must exercise both powers. To so construe the law largely limits its application and the power of the Commission thereunder, which would be distinctly not in harmony with the purposes sought to be accomplished by its enactment as those purposes are announced in the cases we have cited.

Thus, the granting of a right to use by the Commission under this section of the Act would be worthless if a carrier owning terminals had the right to charge such a high rental for the use of its facilities as to prohibit the use. Conversely, the fixing by the Commission of reasonable compensation would be useless unless it also granted a right to use. Thus, it is obvious that the granting of a right to use and the fixing of reasonable compensation for such use are of equal importance.

The law itself makes no distinction between the two functions and does not confine the right to fix compensation to those cases in which a right to use is also granted. In the case at bar, for example, the right to use granted petitioners by the operating agreement is of little value because of the

excessive compensation which they are required to pay therefor.

And the Commission's jurisdiction under this paragraph is clear, even on its own theory. If, upon a consideration of the facts, it should hold that the user basis of dividing all expenses of the Terminal Company was proper, its order would necessarily require and grant the use of the Terminal Company's facilities by the using lines upon the making of payments as between the interested carriers on the basis approved by it. Thus the order would not only fix compensation for use, but also grant the right to use, subject to the payment of such compensation.

In other cases the Commission itself has adopted the theory for which we here contend. Thus, in *C. & A. R. Co.* v. *T. P. & W. R. Co.*, 146 I. C. C. 171, the Commission recognized the right of a railroad to come to it under paragraph (4) of Section 3 for the ascertainment and fixation of compensation to be paid for the use of terminal facilities, even though the right to use was conceded and offered by the carrier owning the facilities. In that case the right to use was offered upon the payment of a rental of $50,000 a year, just as in this case the right to use the facilities of the Terminal Company is granted to petitioners upon their agreement to each pay one-twelfth of the interest and taxes of the Terminal Company, together with other charges.

In the case cited, the complaining road felt that the compensation required to be paid for the use offered was excessive, just as petitioners feel that the compensation required at Kansas City under the operating agreement is excessive. And in the case cited the Commission upheld its jurisdiction, even though the only real issue between the parties involved was as to the amount to be paid for the use. The amount to be paid for the use of terminal facilities was also the only real issue in the *Transit Commission Case*, 289 U. S. 121.

With respect to paragraph (4) of Section 3 of the Act it has been argued that the paragraph only confers rights

upon a carrier not entitled to use terminal facilities. A use of terminal property, however, by a railroad other than the owner may be involuntary because of a claimed insufficiency of payment. Thus, in the case at bar, the Terminal Company was always willing to permit the use of its facilities by the Missouri-Kansas-Texas Railroad if it received the compensation required by the operating agreement. The only real issue between those carriers was that of compensation. The compulsion which it is claimed is necessary under paragraph (4) of Section 3 may well be a compulsion with respect to compensation as well as with respect to physical use.

3. THE COMMISSION ALSO HAD THE SUGGESTED POWER UNDER OTHER SECTIONS OF THE INTERSTATE COMMERCE ACT. THE REMOVAL OF UNDUE BURDENS ON THE INTERSTATE COMMERCE OF RAILROADS IS ONE OF THE COMMISSION'S MOST IMPORTANT FUNCTIONS AND JURISDICTION TO THAT END INHERES IN ALMOST EVERY SECTION OF THE ACT CONFERRING POWER AND AUTHORITY UPON THE COMMISSION.

On many occasions this Court has dealt with the general power of the Commission and has held that it has not only those powers expressly delegated by the Interstate Commerce Act, but also those which are necessary to make the Act effective and produce the results sought to be produced by the Congress.

In *Smith* v. *Interstate Commerce Commission,* 245 U. S. 33, this Court had occasion to deal with the general powers of the Commission under Sections 12 and 13 of the Act. It was said at pages 42 and 43:

> "And it would seem to be a necessary deduction from the cases that the investigating and supervising powers of the Commission extend to all of the activities of carriers and to all sums expended by them which could affect in any way their benefit or burden as agents of the public. * * * Turning to the specialties of the Interstate Commerce Act, we find there that all charges

and treatment of all passengers and property shall be just and reasonable, and there is a specific prohibition of preferences and discriminations in all the ways that they can be executed, with corresponding regulatory power in the Commission."

Thus, even prior to the enactment of the Transportation Act, 1920, the power of the Commission to deal with and prohibit all forms of discrimination and prejudice was recognized. Since the enactment of the Transportation Act, 1920 (U. S. C. A., Title 49, p.....), that power of the Commission has been greatly enlarged. This Court has had occasion to pass on the enlarged powers of the Commission in many cases, such as *Railroad Commission of Wisconsin, et al.*, v. *C. B. & Q. R. Co.*, 257 U. S. 563; *A. C. & Y. Ry. Co., et al.*, v. *United States*, 261 U. S. 184; *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456; *Railroad Commission of California* v. *Southern Pacific Co., et al.*, 264 U. S. 331; *Colorado* v. *United States*, 271 U. S. 153, and *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24, 25.

In the *Wisconsin Case*, 257 U. S. 563, this Court said (p. 585) that the amendments added to the Act in 1920 made a new departure in that, as amended, the Act required the Commission to take the necessary steps to maintain an adequate railway service for the people of the United States. In the *Akron, Canton & Youngstown Railway Company Case*, 261 U. S. 184, it was said (p. 189) that the 1920 amendments introduced into federal legislation a new railroad policy; that it sought to insure adequate transportation service, and that this purpose was expressed in unequivocable language. In the *Dayton-Goose Creek Railway Company Case*, 263 U. S. 456, this Court said, at page 478:

"The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic in the country. * * * To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering

guardianship and control of the Commission which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged. * * * To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety."

In *Railroad Commission* v. *Southern Pacific R. Co.*, 264 U. S. 331, the question presented involved the power of the Commission to pass upon the expenditure of a large amount of money by the railroads in the construction of a new union station. Sustaining the power of the Commission, this Court said (p. 347):

"The purpose of Congress to prevent interstate carriers from incurring expenses which will lessen their ability to perform well their interstate functions, is further shown in Section 439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of Section 20a."

In *Colorado* v. *United States,* 271 U. S. 153, the action was by the State of Colorado to set aside an order of the Commission made under paragraph (19) of Section 1 of the Act, authorizing the discontinuance of operation upon a line of railroad wholly within the State of Colorado. The order was based upon a finding by the Commission of discrimination against and prejudice of interstate commerce. In affirming the order this Court said at page 163:

"Prejudice to interstate commerce may be affected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local inter-

> est may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss."

We call attention to the foregoing quotation, for the prejudice there stated by the Court as being possible is precisely the sort of prejudice and discrimination which petitioners claim exists at Kansas City.

The holding in the *Colorado Case, supra,* has been recently upheld by this Court in *Texas* v. *United States,* 292 U. S. 522. There the issue was the power of the Commission under Section 5 of the Act as amended by the Emergency Transportation Act, 1933, to approve a lease under which the Kansas City Southern Railway, a petitioner in the case at bar, was to acquire the properties of the Texarkana & Fort Smith Railway. The lease permitted the Kansas City Southern to remove from Texas the general offices, etc., of the Texarkana & Fort Smith, in derogation of a state statute confining to Texas corporations the right to operate railroads in that State and requiring such corporations to maintain their general offices in the State and not to move them except with the approval of the State Commission.

The Commission found that $81,000 would be saved annually by the proposed removal. The question before this Court, as stated by it (p. 528, 529) was not the power of Congress to delegate the authority to the Commission, but whether or not the power had already been given. This Court sustained the order, and dealing with policy of the

Act as amended, cited the cases to which we have referred and said (p. 530):

> "It is the primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public."

Dealing with the power of the Commission, this Court said (p. 531):

> "The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. * * * It is in the light of this criterion that we must consider the scope of the Commission's authority in relation to provisions which are intended to relieve intertsate carriers from burdensome outlays."

In *Transit Commission* v. *United States,* 289 U. S. 121, the Commission had made an order under paragraph (18) of Section 1 of the Act with respect to the continued use by the Long Island Railroad of the tracks and other terminal facilities of the Pennsylvania Tunnel & Terminal Railroad Company. The State authorities maintained that the subject matter of the order was not within the jurisdiction of the Commission, but was reserved to the State. As stated by this Court at pages 125 and 126 of its opinion, the Commission had held "that the reasonableness of a joint facility rental is a matter of public interest as well as one affecting the operations of the carriers." Speaking of the general purpose and effect of the Act as amended, this Court said at page 128:

> "So far as concerns the purpose to be attained by this legislation, there is no room for a distinction between unjustifiable expenditures for the construction or operation of new mileage on the one hand and inadequate rentals or extortionate exactions under trackage agreements on the other. The reasons for the exertion of

federal authority, to the exclusion of state regulation, apply with like force to both. The Act, including paragraph (18) and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate. *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585, 589, 590; *New England Divisions Case* (*Akron, C. & Y. R. Co.* v. *United States*), 261 U. S. 184, 189; *Railroad Commission* v. *Southern P. Co.*, 264 U. S. 331, 343; *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 277; *Colorado* v. *United States*, 271 U. S. 153, 163; *Alabama & V. R. Co.* v. *Jackson & E. R. Co.*, 271 U. S. 244, 249."

The broad authority vested in the Commission to prevent unjust discrimination against interstate commerce was emphasized in *Florida* v. *United States*, 292 U. S. 1, where it is said at page 12:

> "The authority conferred upon the Commission by Sec. 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard or destroy that commerce and to provide for the execution of that power through a subordinate body. Shreveport Case, 234 U. S. 342, 351, 354, 355; Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., supra. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case, there is an unjust discrimination against interstate commerce."

This Court has held that the power of the Commission over the general operations of carriers is so broad that it may exist and be exercised even in the absence of a specific provision of the act authorizing such action. Thus, in

Alabama & Vicksburg Railway Company v. *Jackson & Eastern Railway Company*, 271 U. S. 244, there was involved the jurisdiction of the Commission over the proposed construction of a connecting track between the railroads parties to the litigation. In sustaining the jurisdiction of the Commission, this Court said at page 248:

> "Prominent among the enlarged powers of the Federal Commission is the control conferred over construction and equipment of railroads, over their use by other carriers and, generally, over the relation of carriers to one another. While none of the amendments in specific terms confer upon the Commission exclusive power over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question."

And in *Transit Commission* v. *United States*, 289 U. S. 121, the railroads contended that the jurisdiction claimed for the Commission was conferred by paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act. This was denied by the Transit Commission. This Court said at page 127:

> "These provisions do not specifically mention trackage agreements providing for joint use of railroad lines, tracks or other facilities by two or more carriers. The question is whether the general langauge of paragraph (18) includes the arrangement under consideration."

Considering then the general purpose of the Act, this Court sustained the jurisdiction of the Commission.

The specific power which petitioners asked the Commission to exercise has been indicated in some cases. In *Cincinnati, etc., Ry. Co.* v. *Indianapolis Union Ry. Co.*, 36 Fed. (2d) 323, the action was to rescind an election to adopt a contract for the use of the terminal facilities of the defendant company. In sustaining the proposed rescission, the court said (p. 325):

> "The proof is undisputed that the continuance of the present burden will be ruinous and will compel a receivership and a foreclosure of existing mortgages. It is now against the established public policy to permit a railroad to assume burdens which it cannot carry and which must cause at least interruptions and embarrassment to its public duties. * * * It is even within the bounds of possibility that the Commission might prohibit its further performance of the obligation upon its existing terms. See *L. & N. Ry.* v. *Mottley*, 219 U. S. 467; *Cleveland Passenger Terminal Case*, 70 I. C. C. 659."

As we have pointed out, Mr. Justice Hitz dissented from the view of the majority of the Court of Appeals with respect to the Commission's power, and expressed the belief that the Commission had the jurisdiction claimed for it. And to us, it is not even clear that the majority of the Court of Appeals felt that the Commission did not have the power claimed for it. In the opinion of the court it is said (R. 208):

> "Congress has conferred on the Commission broad powers for the purpose of avoiding discriminations, preferences and inequalities, and has likewise given it power to regulate the interchange of traffic and the distribution of cars, to revise extortionate exactions under trackage agreements, to enforce the use by one carrier of the terminal facilities of another, and indeed, to take all necessary steps to maintain an adequate railway service, but it is going too far to say that all or any of these powers of themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist."

All petitioners have ever claimed is that the Commission has power to revise the payments petitioners are required to make under the trackage agreement relating to the use of the Terminal Company's facilities, they claiming that those payments are excessive and extortionate. The Court

of Appeals first recognizes that the Commission has this power and then denies it because of the existence of the operating agreement. As we shall show, the existence of that agreement does not deprive the Commission of any power conferred by law.

From the foregoing, it would seem to be plain that the Commission not only has the claimed power under paragraphs (1), (3) and (4) of Section 3 of the Act, but under other sections as well. Petitioners asked it to exercise no more jurisdiction than it exercised in the *Pennsylvania Company Case,* 236 U. S. 351, the *Louisville & Nashville Ry. Co. Case,* 238 U. S. 1, and the *Chicago, Indianapolis & Louisville Ry. Co. Case,* 270 U. S. 287. True, those cases involved questions of service, but it needs no argument to demonstrate that there may be a discrimination between carriers with respect to charges as well as with respect to service. And since the power of the Commission to deal with discrimination and prejudice is not affected by the form which it may assume, the Commission must have the jurisdiction we claim for it.

The report of the Commission indicates the seriousness of this case to petitioners and the other small users of the Terminal Company's facilities (R. 90). If the Commission does not have the power to deal with the situation presented, its jurisdiction must be much narrower than the limits fixed in the *Colorado Case,* 271 U. S. 153, the *Transit Commission Case,* 289 U. S. 121, the *Texas Case,* 292 U. S. 522, and other cases of similar import.

4. THE CHARACTER OF RELIEF SOUGHT BY PETITIONERS BEFORE THE COMMISSION CONFIRMS THE JURISDICTION AND POWER OF THE COMMISSION TO GRANT SUCH RELIEF.

As we have said, the intervening petitions of petitioners filed with the Commission charged in substance, that the division of the taxes and interest charges of the Terminal Company among its proprietary lines on a numerical basis

instead of on a user basis or on some basis reflecting the amount of use, violated the law. The result of the present method of distributing those charges is indicated by the statement attached to the petition filed in the trial court as Exhibit 2 (R. 60).

From this statement it will be observed that in 1932 every proprietary line of the Terminal Company paid precisely the same amount on account of the taxes and interest charges of the Terminal Company, the payment made by each line constituting one-twelfth or 8⅓ per cent of the total. Petitioner Chicago Great Western Railroad Company thus paid 8⅓ per cent of those charges, although its percentage of use of the Terminal Company's facilities was only 2.61 per cent. Petitioner Kansas City Southern Railway Railway Company paid the same 8⅓ per cent of those charges, although its percentage of use of the Terminal Company's facilities was only 2.24 per cent. Had the taxes and interest charges of the Terminal Company in that year had been divided on the user basis, after crediting income to each user, petitioner Chaicago Great Western Railroad Company would have paid $130,779.39 less than it did pay, and petitioner Kansas City Southern Railway would have paid $139,269.32 less than it did pay. On the other hand, respondent Atchison, Topeka & Santa Fe Railway Company, for example, paid 8⅓ per cent of the taxes and interest charges of the Terminal Company, but its percentage use of that Company's facilities was 26.05 per cent. The division of the taxes and interest charges upon a user basis, after crediting income, would have increased its expenses by $404,351.76. Stated in another way, petitioners paid $130,779.39 and $139,269.32 for something they did not receive, whereas the Atchison, Topeka & Santa Fe Railway received $404,351.76 worth of service for which it paid nothing.

The situation thus shown to exist in 1932 is typical. The report of the Commission shows (Rec. 88) that had all expenses of the Terminal Company, between March 1, 1920,

and December 31, 1923, been distributed on the user basis, instead of on the user basis as to maintenance and operating expense and on the numerical basis as to taxes and interest charges, petitioner Chicago Great Western Railroad Company would have avoided the payment of $540,258.32 and petitioner Kansas City Southern Railway Company would have avoided the payment of $495,908.06. For these payments so made, petitioners received nothing in service or otherwise.

This situation appealed to the Commission and to the Court of Appeals. The Commission was impressed to the extent of recommending (R. 97) a reexamination by participating carriers of terminal arrangements which had been developed in past years, including the division of capital charges and the adjustment of property interests, saying that the subject was obviously of such public importance that a reappraisal should be voluntarily undertaken. The Court of Appeals was similarly impressed, for it said, referring to the statement made by the Commission (R. 207):

> "This suggestion of the Commission that the roads voluntarily amend the contract was obviously the result of the conclusion, inevitable in the circumstances, that the smaller railroads had made an unwise and oppressive agreement which in the light of subsequent events seriously impaired their ability to operate their properties on a satisfactory basis, and there can be no reasonable doubt either of the fact or the result."

Referring to the figures which we have quoted above, the Court continued (R. 207):

> "No further illustrations are needed to show that the contract according to its terms imposes on the smaller lines payments altogether in excess of benefits received, and we have no reason to doubt that if the contract were now in the making the user basis as applied both to fixed charges and operating expenses

would be considered the only fair and reasonable method to adopt."

That this is so can be scarcely open to argument. Relatively speaking, petitioners operate small properties in comparison with such properties as those of respondents Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Chicago, Burlington & Quincy Railroad Company and Missouri Pacific Railroad Company. Their ability to sustain fixed terminal charges of the character here involved is necessarily limited, when compared to the ability of larger and richer roads to sustain similar burdens. And the obligations imposed upon petitioners by the operating agreement are permanent for all practical purposes. The operating and stock trust agreements with the Terminal Company run for a period of 200 years from June 12, 1909, and thus have a future life of approximately 175 years.

The mere statement of the excess payments required from petitioners by the operating agreement, payments for which they receive no return, demonstrates that they are "incurring expenses which will lessen their ability to perform well their interstate functions." *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 347. Their expenditures necessarily made in the local interest of Kansas City traffic are so large as to constitute a serious burden upon all their interstate traffic. *Colorado* v. *United States*, 271 U. S. 153, 163. The excess of payments made by them on account of the taxes and interest charges of the Terminal Company can only be described as a waste of their revenue, the avoidance of which is a direct concern of the public. *Texas* v. *United States*, 292 U. S. 522, 530, 531.

Under these circumstances it is impossible to reconcile the statement of the Court of Appeals (R. 207) that the operating agreement seriously impairs the ability of the smaller railroads, including petitioners, "to operate their properties on a satisfactory basis," with the conclusion

that the Commission does not have jurisdiction to correct the situation. Certainly, if the facilities of the Terminal Company were now being constructed, the prior approval of the Commission would be necessary. That approval would also be required before the Terminal Company could issue its bonds and other securities, and before petitioners and the other proprietary lines could assume any obligations with respect to those bonds and begin the physical use of the facilities.

The theory apparently adopted by the Court of Appeals leads to the conclusion that the power of the Commission cannot be exercised in the case at bar merely because the facilities are already constructed and in use and the securities have already been issued under a contract which is still in effect. There is no valid justification for such a limitation upon the Commission's power. As we hereafter show, the operating agreement cannot be given such effect, and this being so, the power and jurisdiction claimed for the Commission must be held to exist under the present law and the decisions of this Court with respect thereto.

5. THE EXISTENCE OF A CONTRACT TO WHICH PETITIONERS WERE PARTIES AND WHICH PRESCRIBED THE COMPENSATION TO BE PAID BY EACH PARTY FOR ITS USE OF THE FACILITIES OF THE TERMINAL COMPANY DID NOT DEPRIVE THE COMMISSION OF JURISDICTION TO PASS UPON VIOLATIONS OF LAW RESULTING FROM THE APPLICATION OF THE CONTRACT.

It has been consistently argued throughout this litigation that the existence of the operating agreement between the twelve railroads which own all of the stock of the Terminal Company deprived the Commission of jurisdiction to enter any order of the sort requested by petitioners. The contention made before the Commission, as stated by that body (R. 75, 93), was that, the contract being valid, the Commission had no authority to enter an order which would operate as a revision of it. On this point the Commission indicated

that the existence of the contract would not deprive it of jurisdiction, if jurisdiction had been vested in it by the Interstate Commerce Act, saying (R. 94):

> "The underlying principle considered, no such contract can be placed beyond the reach of a competent exercise of such authority merely by the inclusion therein or the relation thereto of outside interests not themselves subject to the act, however cautiously the power should be exercised in such cases. Nor does the fact that the franchise grants are among the mutual covenants make it immune. * * *"

Certainly, no principle of law is better settled than that the existence of such a contract does not make the subject matter of the contract immune from Federal regulation. In *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, the issuance of a pass in consideration of the release of a claim for damages was held to be unlawful under provisions of the subsequently enacted Act to Regulate Commerce, this Court holding that the agreement under which the pass was issued must have been made subject to the possibility of such regulation by Congress as would make the agreement unenforcible or impair its value.

To the same effect are *Calhoun* v. *Massie*, 253 U. S. 170; *Interstate Commerce Commission* v. *A. T. & S. F. Ry. Co.*, 234 U. S. 294; and *State of New York* v. *United States*, 247 U. S. 591. In the latter case a passenger rate of 2 cents a mile charged by the New York Central Railway Company was sought to be upheld on the ground that an increase required by the Commission invalidated a charter contract between the State of New York and the Railway Company, but this defense was overruled. Later cases to the same effect are *Stephenson* v. *Binford*, 287 U. S. 251; *Colorado* v. *United States*, 271 U. S. 153, 165; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266; *Transit Commission* v. *United States*, 289 U. S. 121, 127; *Nebbia* v. *United States*, 291 U. S. 502; and *Texas* v. *United States*, 292 U. S. 522, 531. In the *Federal*

Radio Commission Case, the rule is stated by this Court at page 282:

> "This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises. *Union Bridge Co.* v. *United States,* 204 U. S. 364, 400, 401; *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 634, 638; *Philadelphia, Baltimore & Washington R. R. Co.* v. *Schubert,* 224 U. S. 603, 613, 614; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 260; *Continental Insurance Co.* v. *United States,* 259 U. S. 156, 171; *Sproles* v. *Binford,* 286 U. S. 374, 390, 391; *Stephenson* v. *Binford,* 287 U. S. 251, 276; *City of New York* v. *Federal Radio Commission,* 36 F. (2d) 115, 281 U. S. 729; *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318, 285 U. S. 538; *Trinity Methodist Church, South* v. *Federal Radio Commission,* 62 F. (2d) 850, 288 U. S. ———."

Under these decisions, it scarcely can be argued that if jurisdiction to prescribe the terms upon which the property of the Terminal Company may be used has been conferred upon the Commission by the Interstate Commerce Act and acts amendatory thereof, that jurisdiction is defeated by the physical existence of the operating agreement. Nor are petitioners estopped by reason of their participation in that agreement. *Los Angeles Switching Case,* 234 U. S. 294, 312. The opinion of the Commission indicates the feeling that what petitioners desired it to do was rewrite the contract. Thus, the Commission said (R. 96):

> "Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; * * *"

Again, in stating the contentions of petitioners and the other small users of the Terminal Company's facilities, the Commission said (R. 95):

> "A contention by the Alton that it would not in terms require a revision of the agreement, but merely a revision of the charges now imposed upon that line, would seem to express a distinction without a difference. Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed."

The Court of Appeals apparently had the same view, for it indicated (R. 208) that it thought what petitioners had requested was "the abrogation or annulment of a valid contract." This view of the Commission and of the lower court is a mistaken one. We might concede a lack of power in the Commission to rewrite the operating agreement and compel subscription to such a rewritten agreement by the railroads owning the terminal property. Our point is that the power conferred upon the Commission to prevent or cure prejudice and discrimination may not be confined or limited by the language of the operating agreement. The exact contention of petitioners was well stated by Commissioner Eastman in his dissenting opinion in which he said (R. 112):

> "The opinion of the majority conveys the thought that the intervening small users are trying to persuade us to revise or rewrite the contract for the use of the terminal facilities. I do not so understand their position. Their contention is that no contract can stand in the way of the exercise in the public interest of our powers under the act; and this doctrine is, indeed, admitted and amply supported by citations in the majority opinion. When we exercise such powers in conflict with the provisions of a contract, we do not undertake to revise or reform that contract. We merely direct that certain things be done. If they can be done under the contract, well and good. If they cannot be done under the contract, it must be disregarded. • • •

> Our power in this respect is wholly different from that of a court of equity which undertakes to reform a contract for the benefit of one of the parties to it. We do not seek to enforce the principles of equity but only to administer certain legislative provisions for the protection of the public interest, against which provisions a contract is no bar."

We submit that it may not be doubted that the existence of the operating agreement, requiring certain payments by petitioners as a condition of their use of the Terminal Company's facilities, is not a bar to an order by the Commission, made upon a proper record, and prescribing a different basis of payment as a condition of the same use.

6. NOR DOES THE STATUS OF PETITIONERS AS STOCKHOLDERS OF THE TERMINAL COMPANY LIMIT THE POWER AND JURISDICTION OF THE COMMISSION OR REQUIRE ANY CERTAIN DISPOSITION OF THE CASE.

It must be kept in mind that all amounts paid by each petitioner to the Terminal Company, including payments for interest and taxes, represented a cost to it of its use of the facilities of the Terminal Company. The Commission did not recognize this fact, for it is said in the majority opinion with reference to the interest and tax charges of the Terminal Company (R. 96):

> "Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, * * *"

This is wrong and, as pointed out by Commissioner Eastman in his dissent (R. 116):

> "It confuses the status of the railway companies as stockholders of the Terminal Company with their status as users of its terminal facilities."

The view of the majority of the Commission on this point assumes that ownership of stock in a railroad company carries with it the obligation to pay some portion of the expense incurred in operating the company. Certainly, there is no such obligation. Such expenses, including taxes and interest, are an obligation of the corporation, not the stockholders thereof, and are paid out of the revenues of the corporation. In railroad cases, taxes have been held to be operating expenses of the company against which they are assessed, *Duluth Street Railway Company* v. *Commission*, 4 Fed. (2d) 550; *Georgia Power Company* v. *Commission*, 262 U. S. 625; *Galveston Electric Company* v. *Galveston*, 258 U. S. 388, and from the standpoint of petitioners, the interest charges of the Terminal Company fall in the same category.

In this case, the conclusion that all amounts paid by any user of the facilities of the Terminal Company constitute the total payment made for such use is strengthened by the fact that no company owning stock in the Terminal Company gets any benefit from such ownership, except its right to use the facilities of the terminal. The Terminal Company was not organized for profit and does not earn a profit. The sole purpose of its creation was the construction and/or acquisition of terminal facilities so that its proprietary companies having lines of railroad to Kansas City would have adequate terminal facilities at that point.

The operating agreement confirms this view (R. 16, *et seq.*), for in consideration "of the sums to be paid by" the lines using the facilities of the Terminal Company, that Company agrees to supply those facilities and permit their use by the using lines. And included in the sums so to be paid are the amounts to be paid on account of the taxes and interest charges of the Terminal Company (R. 20). Thus, it appears from the operating agreement itself that the taxes and interest charges of the Terminal Company paid by petitioners are paid as part compensation for their use of the Terminal Company's facilities, and not because of petitioners' status as stockholders of the Terminal Company.

This situation is similar to that in *Chicago, etc., Ry. Co.* v. *Des Moines, etc., Company,* 254 Fed. 924, 254 U. S. 196. In that case also, several railroad companies had caused the incorporation of a railroad company to operate terminals in Des Moines, Iowa. On the point we are now discussing, Judge Hook dissented from the majority opinion in the Court of Appeals, saying at page 954 that since the railroad companies had organized the Terminal Company and invested it with the legal title to their property so that their public duties could be better and more conveniently performed, it determined the character of the terminal organization. He also pointed out, at page 955, that the stock was not intended as a source of profit apart from railroad use, the stock ownership and terminal use being inseparable. This Court adopted the view set forth in Judge Hook's dissenting opinion, saying at page 210:

> "In the hands of the proprietors of the connecting lines the stock was the evidence of their right to participate in the benefits of the trust, in the control and management of the terminal company, and in the use of the terminal; but such use, in the nature of things, must be proportioned, not according to the magnitude of their respective stockholdings, but according to their respective traffic requirements. And since the terms of the trust required that these connecting lines should have the entire beneficial use of the property upon paying the cost of the terminal service, there was no room for a profit from the operations of the terminal company out of which dividends could be paid. Except in the theoretically possible but extremely improbable event of an abandonment of the terminal (as to the effect of which no opinion need be expressed), it is plain that, as between the parties to the trust and others having notice of it, the stock could have little or no exchange value except to a company owning or operating a railroad line connecting or capable of connecting with the terminal."

That all amounts paid by the users of the facilities of the Terminal Company are paid only as compensation for that

use is so obvious as to make argument difficult. The fact is that the railroad companies which formerly owned the terminal facilities at Kansas City might well have continued to operate those facilities themselves, as they formerly did, or for the benefit of all railroads under operating agreements without the formation of a separate corporation. In either such case it could scarcely be denied that all expenditures made by each using company for the privilege of using all such terminal facilities would have represented a cost to each such company arising out of such use.

Or, on the other hand, the proprietary companies might have created the Terminal Company as a separate corporation but reimbursed it for all expenses through the medium of payments made under tariffs instead of under contract. In such case it could hardly be contended that that proportion of the tariff charges paid by the users and which was devoted by the Terminal Company to the payment of interest and taxes did not represent a cost of terminal facilities incurred by the using and paying lines.

We submit it must be held that any amounts paid by petitioners on account of the taxes and interest charges of the Terminal Company were paid by them as compensation for their use of the facilities of the Terminal Company and not because of any obligation resulting only from their ownership of stock of the Terminal Company. It follows that the ownership of such stock by petitioners cannot affect the power of the Commission to deal with such charges.

7. THE EXERCISE OF JURISDICTION BY THE COMMISSION WILL NOT ADVERSELY AFFECT ANY PUBLIC INTEREST.

In its decision (R. 91) the Commission referred to the argument presented to it that the operating agreement had been assigned as part of the security for the bonds of the Terminal Company and that the security of these bonds would be jeopardized or destroyed if there were any readjustment of the compensation paid by the proprietary lines to the Terminal Company. We wish to make it plain

that there would be no such result if the Commission prescribed such a change in compensation as petitioners asked. As appears from the Commission's report (R. 86) and the operating agreement (R. 21) every proprietary line of the Terminal Company has a joint and several obligation with respect to the bonds issued by that Company.

It can make no difference to the holder of a bond of the Terminal Company where that Company secures the money with which to pay him. The operating agreement provides that if default in payment is made by any using line, the other using lines must make good the deficit. Thus, if default were made by every using line except petitioners, they would have to pay all obligations of the Terminal Company so long as they were able, either on a user or numerical or some other basis. A bondholder is only concerned in receiving his money, and can have no interest in the source from which his debtor secures the money with which to pay him.

Petitioners have never claimed that any order should be made by the Commission which would affect the right of a holder of the Terminal Company's securities to receive his money. All they have asked is that the basis of contribution by companies using the facilities of the Terminal Company should reflect the volume of such use, and the power of the Commission to require that this be done cannot be affected by the obligations of the Terminal Company to the holders of its bonds.

IV.

Petitioners have not been guilty of laches in this case.

A defense urged in the lower courts was that the delay of petitioners in starting this action constituted such laches as to justify the denial of the writ. The claimed laches, however, was not a ground upon which the decisions of the lower courts were based. There are two sufficient reasons why laches should not prevail as a defense to this

action. The first is that in no answer filed by any respondent is the defense of laches raised. In some jurisdictions it may not be necessary to raise this defense in an answer, (see *Moore* v. *Nickey,* 133 Fed. 289, 293; *Sullivan* v. *Portland,* 94 U. S. 806, 811), but in the District of Columbia the practice and pleading is largely prescribed by a code, which in Section 213, Title 24, under Part II, Mandamus, provides:

> "The defendant, by the day named in such order, unless for cause shown the court shall extend the time, shall file an answer to such petition, fully setting forth all the defenses upon which he intends to rely in resisting such application, which shall be verified by his affidavit."

Laches is essentially a defense and it would seem to follow that since it was not set up as such in any answer filed herein, it may not now be urged as justifying the decision of the lower court.

A further complete answer to the claim of laches appears upon the face of the facts. It is true that considerable periods of time elapsed between the steps taken in the proceedings before the Commission and in court. The report of the Commission was made on November 10, 1925, and from that time until the spring of 1931, nothing was done in the case before the Commission by any party. Petitioners' petitions for rehearing were filed with the Commission in April and May, 1931, and were denied on June 1, 1931. The petition in this case was filed May 31, 1933. Laches cannot be claimed in this Court because of petitioners' delay in filing petitions for rehearing with the Commission, so that the claim must be based upon the lapse of two years between the denial by the Commission of petitioners' petitions for rehearing and the starting of this action.

The controlling circumstance is that during this period there was no change whatever in the conditions under which the property of the Terminal Company was used by petitioners and the railroad respondents. As is stated in the record (R. 195), the same basis of payment prevails now as in 1925. It follows that no respondent has been prejudiced by petitioners' failure to start this suit at an earlier date, and this being so, the doctrine of laches has no application. If any such damage has resulted, it has been imposed upon petitioners and the other smaller users of the Terminal Company's facilities.

It is well settled that the mere passage of time does not constitute laches. *Bunch* v. *United States,* 252 Fed. 673, 677, 678; *Spiller* v. *St. L. & S. F. R. Co.,* 14 Fed. (2d) 284, 288, affirmed 274 U. S. 304; *Kansas City Southern R. Co.* v. *May,* 2 Fed. (2d) 688, 689; *Southern Pacific Company* v. *Bogert,* 250 U. S. 483, 448-490. There is no statute of limitations applicable to the action which petitioners seek to compel and, this being true, laches has no function. *Bunch* v. *United States, supra; Williamson* v. *Monroe,* 101 Fed. 322; *Broatch* v. *Boysen,* 175 Fed. 702, 707; *Brun* v. *Mann,* 151 Fed. 145, 154.

Moreover, petitioners now have and in the past have had a continuing right to a decision by the Commission upon the merits of the issues presented to it, and under these circumstances it has been held that the doctrine of laches does not apply. *Amy* v. *City of Galena,* 7 Fed. 163, 166; *United States* v. *Board of Auditors,* etc., 28 Fed. 407, 409; *Bedgisoff* v. *Cushman,* 12 Fed. (2d) 667, 668. In cases where lapse of time has not prejudiced any party to the litigation, the claim of laches has been uniformly unsuccessful. *Chapman* v. *Douglas,* 107 U. S. 348; *Chiswell* v. *Johnston,* 299 Fed. 681, 689; *Spiller* v. *St. L. & S. F. R. Co.,* 14 Fed. (2d) 284, 288; *Kansas City Southern R. Co.* v. *May,* 2 Fed. (2d) 688-689.

A decision of this Court affirming the order of the lower court on the ground of laches would preclude a determina-

tion by this Court of the Commission's jurisdiction, and since it may at least be claimed that the Commission has the jurisdiction claimed for it, such a decision might well deny to petitioners that justice to which they are entitled. The doctrine of laches should never be applied when its application operates to defeat justice. Thus, in *Bunch* v. *United States,* 252 Fed. 673, 677, the Court said:

> "The doctrine of laches is an equitable principle, which is applied to promote, but never to defeat, justice."

On this point see also: *Williamson* v. *Monroe,* 101 Fed. 322, 330; *Spiller* v. *St. L. & S. F. R. Co.,* 14 Fed. (2d) 284, affirmed 274 U. S. 304; *Kansas City Southern R. Co.* v. *May,* 2 Fed. (2d) 688, 698; *Brun* v. *Mann,* 151 Fed. 145.

Petitioners have never acquiesced in the wrong which they claim was inflicted upon them. From November 10, 1925, when the Commission's report was issued, until March, 1931, no action was taken by any party to the case instituted by the Missouri-Kansas-Texas Railroad, nor did the Commission set the case down for hearing. In May, 1931, petitioners filed their petitions for rehearing, reasserting their claimed rights and refuting any claim of acquiescence by them in what the Commission had done. *Southern Pacific Company* v. *Bogert,* 250 U. S. 483.

Thus, every consideration points to the conclusion that the claim of laches now presented to this Court should be overruled, not only because it is a defense not available to respondents under the pleadings, but also because the facts do not justify its application. If it is sustained, petitioners may perhaps be denied legal rights, the present recognition of which will impose no burdens upon respondents which would not have been imposed upon them had such rights been recognized as long ago as 1925.

All cases in which the claim of laches was sustained are distinguishable upon the facts. Thus, in *Arant* v. *Lane,* 249 U. S. 267, the allowance of the writ might have required

the double payment of salaries, thus imposing an unrecoverable loss upon the Government. *In the Matter of Eastern Cherokees,* 220 U. S. 83, the fund with respect to which the writ was sought had been almost entirely distributed and the allowance of the writ might have caused the Government to make double payments.

In *Ex parte American Steel Barrel Company,* 230 U. S. 35, the petitioners delayed their petition from April, 1912, until February, 1913, during which time the judge whose jurisdiction was attacked had exercised continuous jurisdiction, making many orders and rulings in respect of which it was claimed the lack of jurisdiction existed. In *United States* v. *Blair,* 293 Fed. 846, the allowance of the writ would have created what the Court described (p. 848) as "endless and needless confusion" and the real purpose of the tax laws would have been measurably defeated.

Nor has the delay prejudiced the Commission. It is true that since this case was decided in the lower court the Commission has made an order in the proceedings before it. It is equally true, however, that any further hearings before the Commission which might have been necessary on the issues now raised by petitioners would have been largely on issues of law, and would have been necessary no matter when petitioners' right to such hearings might be established. This results from the fact that the relief requested by petitioners is based upon somewhat different legal principles than those upon which the Missouri-Kansas-Texas based its claims.

We submit that the decision in *Thorpe, et al.,* v. *William Filene's Sons Co.,* 40 Fed. (2d) 269, states the rule to be applied in this case. The case at bar is an action at law, and in the case cited, it is held that the doctrine of laches has no application to actions at law since it is only a defense to the extent that it creates an estoppel. Continuing, the Court said at page 269:

> "The basis of estoppel is deceptive or misleading conduct by the plaintiff on which the defendant has

relied to his injury. Simmons v. Burlington, etc. Rwy. Co., 59 U. S. at page 291, 16 S. Ct. 1, 40 L. Ed. 150; Ward v. Sherman, 192 U. S. 168, at page 177, 24 S. Ct. 227, 48 L. Ed. 391. Mere delay by the plaintiff may constitute such laches as will deprive him of equitable relief, but I am aware of no case in which it has been held to constitute a defense to an action at law, except, of course, under the statute of limitations."

Again, on page 270, the Court said, referring to the actions of the plaintiffs in the suit before it:

"They have, however, on the defendant's own affidavits done nothing active to mislead or deceive it, nothing which would justify saying that their conduct has been so deceptive as to make it inequitable to permit their action to be pressed. They are much like persons who have watched a trespasser go to and fro over their property for many years without making efforts to stop him, and who at last take action. The principle of estoppel has never been extended to such cases. To do so would amount to amending the statute of limitations."

The claim of laches was accordingly overruled, and the same action should be taken in the case at bar.

V.

The case is not moot.

It has also been suggested in the lower courts that since the Commission has made an order in the proceedings before it, which order disposes of the issues raised by the Missouri-Kansas-Texas Railroad Company, this case has become moot. Neither of the lower courts based its decision upon this point.

We submit that the entry of such an order does not make this case moot. The decision of the Commission is not final in the sense that a court judgment becomes final. It is not actually a judgment. It is always subject to rehearing, on petition or on the Commission's own motion, and may al-

ways be set aside and the proceeding reopened. Moreover, the rights asserted by petitioners in their intervening petitions to the Commission were peculiar to them, and they are entitled to an adjudication of those rights regardless of what may have been done with respect to the claim of the Missouri-Kansas-Texas Railroad Company.

The application of the Missouri-Kansas-Texas Railroad Company to acquire the right to use the facilities of the Terminal Company involved a number of questions. One was whether the Missouri-Kansas-Texas Company should use the Terminal Company's facilities except in conformity with the provisions of the operating agreement between the Terminal Company and the companies using its facilities. Another was the question of whether the operating agreement was fair to the Missouri-Kansas-Texas Company. Other questions, raised by the intervention of the small users, were whether the operating agreement was fair to the small users, and whether the Missouri-Kansas-Texas Company could acquire the right to use the Terminal Company's facilities on terms more favorable than were imposed upon the small users. Petitioners and the other small users were directly interested in the answers to each of these questions.

It will be observed that while petitioners were interested in the answers to all the foregoing questions, the Missouri-Kansas-Texas was not directly interested in the decision of any issues except those raised by its application. So far as petitioners were concerned, the issues in which they were interested were raised by their intervening petitions.

The Commission has now decided the issues on the application of the Missouri-Kansas-Texas Company, and it has also held that it had no jurisdiction to grant the relief prayed for by the small users, including petitioners. If it has such jurisdiction, it is its duty under the intervening petitions, and upon its own motion as well, to hear and determine the question as to whether there is a discrimination in favor of the large users and against the small users of

the Terminal Company's facilities. Until this question of jurisdiction has been determined the case is not moot, so far as petitioners' rights are concerned. It has been held in many cases that where an intervening petition in an action at law or in equity is dismissed on the ground that it does not state a cause of action, the intervener may review such judgment on a writ of error. *United States* v. *Northwestern Development Co.*, 203 Fed. 960; *In re Michigan Central R. R. Co.*, 124 Fed. 727; *Illinois Steel Company* v. *Ramsey*, 176 Fed. 853; *Automobile, etc., Corp.* v. *United States*, 39 Fed. (2d) 288.

We do not cite these cases on the theory that this mandamus case is a proceeding to review a decision made by the Commission on the merits. On the contrary, we contend there has been no decision on the merits. The cases are cited for the purpose of showing that where a party has been permitted to intervene in a case, and a decision has been made against him, he has a right to pursue any proper remedy in the proceeding in which he was permitted to intervene. He does not lose that right because there may have been no appeal by the original parties in the proceeding. This is also true in litigation involving orders of the Commission. In *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.*, 288 U. S. 14, the right of the Commission, an intervener in the lower court, to a decision on the merits, was upheld although the United States, the statutory defendant, had refused to appeal.

Also, as we have said, it is a legal obligation of the Commission to compel the discontinuance of charges made by a carrier which unlawfully favor some other carriers, and constitute an undue burden on the interstate commerce of still other carriers. There is presented in this case, therefore, a question of public interest. It is the duty of the Commission to investigate such a question, and if it fails to perform its duty on the assumption that it has no jurisdiction, the right of an intervener to such an in-

vestigation and a decision thereon ought not to be denied on the ground that the case has been disposed of on other issues. 4 C. J. 576, Notes 81-82-82, Sec. 2383; *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U. S. 498; *Southern Pacific Company* v. *Interstate Commerce Commission,* 219 U. S. 433; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290.

A decision disposing of this case on any issue other than that of the Commission's jurisdiction would require a repetition of all steps taken in the proceedings up to this time. Such procedure would cause substantial delay, large expense, and would serve no good purpose.

CONCLUSION.

For all of the reasons which we have heretofore given, we submit that the judgment of the Court of Appeals should be reversed. The decision of that Court that the Commission had actually exercised its power and jurisdiction is plainly based upon a complete misunderstanding of the decisions of this Court.

So far as the merits of the case are concerned, we do not see how it can be denied that the Commission has the jurisdiction claimed for it. A denial of that jurisdiction will perpetuate a situation whereby the revenues of petitioners are being constantly wasted and dissipated. Instead of being employed to maintain the properties and equipment of petitioners in such a state of efficiency that they can carry well the burden of handling the traffic of the country, those revenues are being spent to lighten the burdens of other carriers who are enjoying substantial privileges without payment therefor. No clearer case of the existence of undue discrimination against and burden upon the interstate revenues and operations of carriers can be imagined than is presented here.

It is inconceivable that under these circumstances there can be a successful denial of the Commission's power to

correct the situation. A denial of that power in the Commission must necessarily impose substantial limitations upon powers which have heretofore been conceded to reside in the Commission. We submit that the judgment of the Court of Appeals should be reversed with directions to issue the writ of mandamus prayed for.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 234

THE UNITED STATES OF AMERICA, EX REL., CHICAGO GREAT WESTERN RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS.

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THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 234.

THE UNITED STATES OF AMERICA, EX REL., CHICAGO GREAT WESTERN RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONERS.

MAY IT PLEASE THE COURT:

In the briefs filed herein, all respondents take the position that the Commission exercised a jurisdiction which makes its action impregnable to mandamus. In addition, the brief of the Kansas City Terminal Railway Company (hereinafter called the Terminal Company) argues that the Commission did not have the power which it is said to have exercised, thus taking both sides of the same question. We wish to submit a brief reply to the arguments presented.

The question of whether or not the Commission denied its power.

The Commission argues in its brief (pp. 28 *et seq.*) that mandamus is not available to control the judgment and discretion of the Commission. We wish to make it plain that petitioners do not contend that the manner in which the Commission should exercise its power and discretion can be controlled by mandamus. Our only claim is that a wrongful denial of power by the Commission; a refusal by it to exercise a power and jurisdiction conferred upon it by statute, is subject to mandamus, and that in this case there was such a wrongful denial of power and refusal to act.

The argument made seems to reduce to two points which are somewhat contradictory of each other. One is that the Commission, by sustaining a challenge of its power to act, exercised a judgment and discretion which cannot be controlled by mandamus. The second is that the action of the Commission was not a negative determination of its power, but an administrative determination that petitioners' legal position was such that no relief could be given them.

The answer to the first point made is obvious, for certainly a court or commission does not exercise jurisdiction and power by declining to do so. In the *Humboldt Steamship Company Case,* 224 U. S. 474, it was urged that the Commission's action, being an alleged error of law, could not be corrected by mandamus. But the claim was overruled, this Court saying at page 484:

> "But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion."

In *Miguel* v. *McCarl,* 291 U. S. 442, this Court said (p. 452), citing *Roberts* v. *United States,* 176 U. S. 221, that the act of an officer of government may be ministerial even though it depends upon a statute which requires some con-

struction by the officer. We submit that in this case the taking of jurisdiction by the Commission for the purpose of holding that it did not have the power and authority claimed for it was not an action impregnable to mandamus.

On the second point made, the language used by the Commission in its report and quoted in our main brief demonstrates that it was passing on the question of its own power and authority and not upon the legal status of petitioners. No respondent has claimed the contrary; in fact, those statements of the Commission are not discussed. That the Commission did deny its power and authority is the only conclusion to be drawn from its statements that the motion to dismiss petitioners' petitions was a challenge of its power (R. 92); that the question for decision was whether or not the claimed power had been conferred upon it (R. 94); that the claimed power and authority had not been conferred by Section 3 (4) (R. 95) or by any other provision of the Act. (R. 96.) In the *Louisville Cement Company Case,* 246 U. S. 638, statements by the Commission that it was "without power to grant the relief prayed for" and that it was "without jurisdiction," were held (pp. 641, 642) to demonstrate a denial of power and authority. The Commission used the same phrases in its report in the case at bar.

This circumstance distinguishes the case at bar from *B. A. & P. Ry. Co.* v. *United States,* 290 U. S. 127, *Interstate Commerce Commission* v. *United States,* 289 U. S. 385, and *Interstate Commerce Commission* v. *N. Y., N. H. & H. R. Co.,* 287 U. S. 178, cited by respondents. In the *B. A. & P. Ry. Co. Case,* 290 U. S. 127, there was no question of the Commission's power to deal with the matter presented to it. The construction to be placed upon the word "deficit" was as much a part of the merits of the claimant's case as any other essential fact that it was required to prove, and the Commission exercised the authority conferred upon it

by law when it determined that construction. In *Interstate Commerce Commission* v. *United States, ex rel. Campbell,* 289 U. S. 385, the Commission held that the proof submitted to it was insufficient to justify an award of reparation; obviously an exercise of power and authority. In the *N. Y., N. H. & H. Ry. Co. Case,* 287 U. S. 178, the value claimed by the railroad had been included in the valuation of its properties by the Commission, and the issue was the propriety of the method followed in stating the value.

Thus, in all these cases the Commission had actually exercised power within the limits of its jurisdiction. The only question presented was whether it had acted properly, and in accordance with its previous decisions, this court held that it would not undertake to control the judgment and discretion of the Commission. In *General Investment Co.* v. *N. Y. C. R. Co.* 271 U. S. 228, also cited by respondents, this court held (p. 230) that whether a plaintiff seeking relief has the requisite standing is a question going to the merits, but the case has no application here. As appears from the report of the Commission, its action was not based on the lack of standing on the part of petitioners, but on the alleged lack of power on the part of the Commission itself.

The argument that the Commission exercised jurisdiction is based upon respondents' complete failure to give any consideration to the issue presented to the Commission by the motion to dismiss petitioners' petitions or to the language used by the Commission in deciding that issue. As we pointed out in our main brief (p. 21), even the language used by the Commission in dealing with paragraphs (1) and (3) of Section 3 of the Act (R. 96) is a disclaimer of power, rather than an exercise of it.

There is a further answer to respondents' argument that the Commission did exercise a power and authority within the jurisdiction conferred upon it by statute. As we said

in our main brief (pp. 50, 51), the Commission apparently considered petitioners' intervening petitions as applications by petitioners for a revision or reformation of the operating agreement. This was in error, for the issue actually presented to the Commission was one of prejudice and discrimination alleged to be in violation of law. If the Commission, in doing what it did, was passing upon its right to revise the operating agreement, its action cannot protect it against the issuance of the writ prayed for herein. In such case, its conclusions dealt with an issue not before it for consideration and did not constitute an adjudication of any of the merits of the claims presented by petitioners.

This is so, no matter what the Commission said or did on the issue of its power to revise or reform the operating agreement and regardless of what its power may have been to deal with that issue. An exercise of power by the Commission sufficient to defeat mandamus must be the exercise of a power committed to it by law. It may not consist of the expression of opinion on a matter not committed to it by law and hence beyond its power, or on a matter not before it for decision. In *United States* v. *Interstate Commerce Commission*, 252 U. S. 178, the Commission declined to ascertain certain facts required by the Valuation Act, for the reason, as stated by it, that such ascertainment was beyond the possibility of rational determination and called for inadmissible assumptions and impossible hypotheses. Under respondents' theory, that action amounted to the exercise of jurisdiction, judgment and discretion. This court, however, held that mandamus would lie to compel action by the Commission, saying (p. 188) that the Commission's action was "an unwitting assumption of authority by the Commission which it did not possess."

Thus, no matter what view is taken of what the Commission did, the writ prayed for should issue. Had the Com-

mission taken jurisdiction of the issues actually presented to it, it would have been required upon the conclusion of testimony, to find the facts determining the existence or non-existence of the prejudice and discrimination which was claimed to exist and then announce its conclusion upon those facts. Certainly, it did not do this, nor do we understand that respondents claim it did. If, then, it declined to act on the charge of unlawful discrimination and prejudice presented to it, and on which it certainly had power to act, its action was clearly wrong and the writ should issue.

On the other hand, even if it actually exercised its power and discretion, as asserted by respondents, it would seem that the power was exercised in considering the question of whether there should be a revision of the operating agreement. Since this question was not submitted to it for consideration, its determination thereof, whether on the merits or otherwise, does not give it immunity from mandamus to compel it to exercise its undoubted jurisdiction and power with respect to the issue which was submitted to it.

The Question of the Commission's Power.

Respondents differ among themselves on the question of whether the Commission actually had the power and authority claimed for it by petitioners. The contention of the Commission seems to be that it not only exercised its power in dismissing petitioners' petitions, but actually had the power which it exercised. On the other hand, the Terminal Company, while agreeing that the Commission exercised power to the extent that its action is not subject to correction through mandamus, further asserts that this exercise of power was gratuitous on the part of the Commission, and devotes many pages of brief to the proposition that the Commission had no power to do that which the Terminal Company says it did. The other intervening

railroad respondents have filed a brief concurring in the various arguments presented by the Terminal Company.

The position of the railroad respondents with respect to paragraphs (1) and (3) of Section 3 of the Interstate Commerce Act is predicated upon a word by word analysis of the language of those paragraphs, it being claimed that they contain no language conferring upon the Commission jurisdiction over such relations between railroad companies as those existing at Kansas City. It is further claimed that any doubts as to that jurisdiction would have to be resolved against its existence because it would confer upon the Commission power to revise the operating agreement.

In order to reach these conclusion, the railroad respondents have been compelled to take a much narrower view of the prohibitions against discrimination and prejudice contained in paragraphs (1) and (3) of Section 3 than this court has ever taken, and have also been compelled to disregard certain language of the paragraphs themselves. It is said that paragraph (1) deals only with discrimination and prejudice against shippers, this conclusion being supported by citations from a few decisions of courts and the Commission. These decisions do not, we submit, support the conclusion reached.

In *Texas & Pacific Railway Company* v. *United States,* 289 U. S. 627, this court held that the purpose of Sections 2, 3 and 4 of the Act was to prevent unjust discrimination resulting from existing practices, the Act having been passed for the protection of those who pay or bear the rates. Since petitioners do pay and bear the charges of which they complain in the case at bar, they claim no meaning in the Act which this court has not upheld.

In *Oregon Short-Line Railway Company* v. *Northern Pacific Railroad Company,* 61 Fed. 158, it was held that the complaining railroad could not appropriate the grievance of a traffic or locality and complain on account of it. Peti-

tioners are not doing this, as the claimed discrimination and prejudice operates only to their disadvantage. Their case is not based upon an injury to anyone else.

In the *Southwestern Bell Telephone Company Case,* 183 I. C. C. 771, and in *Discontinuance of Inland Stations in New York City,* 173 I. C. C. 727, the Commission did hold that the discrimination and prejudice prohibited by Section 3 (1) was a prejudice of and discrimination against shippers, but this conclusion was based upon what was said to be the legislative history of the paragraph. That legislative history, as quoted in the brief of the Terminal Company (pp. 28, 29), is no more than a statement of the language of the paragraph, which remits us to the language of the paragraph to discover its meaning. Moreover, in the *Southwestern Bell Telephone Case* the Commission did hold that Section 3 (3) specifically prohibited discrimination between carriers, but the railroad respondents deny this, although seeking the advantage of the Commission's holding with respect to the meaning of Section 3 (1).

The argument of the railroad respondents as to the character and kind of prejudice and discrimination prohibited by paragraphs (1) and (3) of Section 3 disregards every decision of this court announcing the effect of the paragraphs as related to the general purposes of the Interstate Commerce Act. As long ago as 1914, this court, in *H. E. & W. T. R. Co.* v. *United States,* 234 U. S. 342, considered the language now contained in Section 3 (1) of the Act. In that case the Commission had required the removal of discrimination against interstate commerce, its action being taken under Section 3 (now Section 3 (1)) of the Act. Dealing with the claim that authority to make the order had not been conferred upon the Commission by Congress, this court quoted the language of the law and said at page 356:

"This language is certainly sweeping enough to em-

brace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach."

This announcement of the purposes of the law has been consistently approved by this court in all subsequent decisions on the same subject (pp 28 *et seq.* our main brief), but these decisions are ignored by respondents or are sought to be distinguished on immaterial grounds. We submit that the application of the law can not be limited as respondents seek to limit it. To so limit it would deprive the Commission of a major weapon in combating the evils at which the law was aimed and would severely cripple it in attempting to carry out the purposes of Congress.

The argument of the railroad respondents necessarily implies a lack of power in the Commission to deal with the Kansas City terminal, no matter what the facts are. Thus, those facts might show the existence of an undue and unjust prejudice of and discrimination against petitioners. It might appear, as petitioners claim it does, that the payments made by them because of their use of the facilities of the Terminal Company are so burdensome as to probably cause their bankruptcy; that such payments only benefit other roads, and that petitioners receive nothing for them; that such payments are so large in amount as to limit or destroy petitioner's ability to perform well their interstate functions. Nevertheless, the argument of the railroad respondents would compel the conclusion that the

Commission has no power or authority under the law to correct the situation. We submit that this is not so.

This court has held that the "preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern" (*T. & P. R. Co.* v. *Gulf, etc. R. Co.*, 270 U. S. 266, 277); that prejudice to interstate commerce may result from "excessive expenditures in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce" (*Colorado* v. *United States*, 271 U. S. 153, 163); that the purpose of Congress was "to prevent interstate carriers from incurring expenses which will lessen their ability to perform well their interstate functions" (*Commission* v. *S. P. R. Co.*, 264 U. S. 331, 347). And the statute itself contains "a specific prohibition of preferences and discriminations in all ways that they can be executed, with corresponding regulatory power in the Commission." (*Smith* v. *I. C. C.*, 245 U. S. 33, 43.)

These holdings cannot be reconciled with a construction of the law which would permit at Kansas City the continuance of a prejudice and discrimination which can be shown to be so pronounced as to constitute a severe drain upon the resources of petitioners; so severe, indeed, that it may well lessen their ability to perform well their interstate functions. Paragraphs (1) and (3) of Section 3 contain apt words upon which the power of the Commission to act in this case may be properly based. In so acting, it would exercise no power which it has not exercised many times in the past.

Many cases are cited by the Terminal Company on the proposition that the distribution of the tax and interest charges of the Terminal Company among its owning lines is a matter of corporate relationship with which the Commission can have nothing to do. The Terminal Company

has designated these charges at page 31 of its brief as "payments on account of a vested proprietary right in physical facilities and their use." But nowhere in the brief is it said that petitioners receive anything for the money paid by them to the Terminal Company or on its account, other than the use of its facilities to the extent that those facilities are used. It must be conceded, as it apparently is, that this is the only benefit received by any proprietary line of the Terminal Company for the payments made by it. The operating agreement itself so provides.

There is in this case, therefore, no question of the intercorporate relationships of railroad companies, aside from those relationships necessarily resulting from the obligation of petitioners and the other proprietary lines to perform their duties as common carriers in interstate commerce. The distribution of the capital stock of the Terminal Company among its proprietary lines has nothing whatever to do with this relationship. There being nothing here involved but the payments made by petitioners for a right of user essential to the discharge of their duties as common carriers in interstate commerce, it would seem to follow that the Commission has power to prohibit any prejudice or discrimination in those payments.

Much is also said in the brief of the Terminal Company with respect to the facts in connection with the acquisition of its present property, and there is considerable speculation as to what would have been the rights of the various trunk lines had something else been done. Such discussion is profitless. The essential facts are that the Terminal Company was formed and its properties acquired or constructed for the sole purpose of furnishing terminal facilities for all the railroads serving Kansas City; that those facilities are now used by those railroads,

including petitioners, in the discharge of their duties as common carriers in interstate commerce; that this use is all they get for the money expended by them; and that their ownership of some percentage of the stock of the Terminal Company means nothing, either with respect to the right of user or with respect to the obligation to pay.

We submit that these circumstances fix a jurisdiction in the Commission which cannot be affected by the designation of certain of those charges as "capital expenditures" or by assuming that had some other plan been followed, the rights and obligations of the various railroads would have been different. The argument of respondents on this point, as stated by Commissioner Eastman (R. 116), confuses the status of the railroad companies as stockholders of the Terminal Company with their status as users of its terminal facilities.

The major argument presented by the railroad respondents is predicated upon the assumption that the Commission was called upon by petitioners to modify or annul the present operating agreement. This proposition is repeatedly stated in the brief of the Terminal Company in various forms. At page 23 it is said that the Commission was asked to set aside a contract. At page 39 it is said that there is no authority in paragraphs (1) and (3) of Section 3 for the annihilation of the operating agreement. At page 42, reference is made to the power of the Commission to set aside contracts already made. At page 45, it is said that if Congress had intended to destroy solemn contracts without compensation it would have made that intention plain. At page 49, it is said that petitioners want a revision of the operating agreement.

Starting from this assumption, it is argued that the law does not specifically confer upon the Commission power to set aside the operating agreement, and that this power

is so far reaching that it may not be inferred; that consequently the power does exist and that the Commission's denial of that power was proper and must be sustained. This entire argument is based upon the false premise that petitioners asked the Commission to deal with the operating agreement. Such is not the case, although the Commission apparently had that idea. (R. 95, 96.) The Court of Appeals also seems to have the same idea. (R. 208.) This mistaken view of the Court of Appeals may may have been responsible for the conclusion stated by it with respect to the Commission's power. (R. 208.)

As we said in our original brief (p. 51), we may concede a lack of power in the Commission to modify or annul the operating agreement, but this lack of power in the Commission implies no lack of power to deal with an unlawful discrimination and prejudice resulting from the operation of the agreement. In dealing with that discrimination and prejudice, the Commission would give no consideration to the agreement at all, as its power to deal with such a violation of the law is not affected by the existence of the agreement. The Commission has itself adopted this view in other cases.

In *Long Island Railroad Company Trackage*, 162 I. C. C. 218, it was claimed that the Commission did not have jurisdiction of the compensation to be paid for the trackage there in issue. Without undertaking to pass upon the validity of the state statute which it was claimed reserved jurisdiction to the New York Transit Commission, the Commission said at page 221:

> "The power conferred upon us by the Act is in the interest of protecting interstate commerce. The carriers here involved being engaged in interstate commerce, our jurisdiction is plenary."

On the further hearing in the same case (180 I. C. C.

439), the same question of jurisdiction was raised, but the Commission only said, at page 446, with respect to this contention:

> "It is unnecessary to repeat what was stated in our prior report with respect to our jurisdiction."

The order it finally made in the proceeding was sustained by this court in *Transit Commission* v. *United States,* 289 U. S. 121.

In *Long Island Railroad Company Abandonment,* 162 I. C. C. 363, the jurisdiction of the Commission was challenged on the ground that it constituted an invasion of the state sovereignty, since the Transit Commission of New York had ordered the removal of grade crossings on the line proposed to be abandoned, which crossings could only have been removed through expenditures so great as to be regarded by the Commission as wasteful and therefore a burden on interstate commerce. Both in the first hearing and in a subsequent hearing at 166 I. C. C. 671, the Commission declined to pass upon the constitutional questions thus raised, only saying (162 I. C. C. 363, 374) that it was of opinion that it had the requisite jurisdiction and power. Its order in the case was sustained by this court in *Transit Commission* v. *United States,* 284 U. S. 360.

The same conduct by the Commission has been specifically approved by this court in other cases. In *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382, it was argued that the order of the Commission there attacked was void for the reason that the applicant did not have corporate power to operate the ferry which was the subject of the application. This court said at page 391, that this question of corporate power was one which could not be considered since Congress never intended to impose upon the Commission the duty of determining matters of

that nature before granting or withholding assent to the construction of an extension.

In *New York Central Securities Corporation* v. *United States,* 287 U. S. 12, the order of the Commission was challenged upon the ground, among others, that the proposed leases were *ultra vires* and in conflict with certain Ohio statutes. This court held (pp. 26, 27) that the Commission was not required to consider these questions, saying that there was no warrant for concluding that Congress intended to fetter the exercise of the Commission's authority by requiring that it determine such matters before making an order, and that the question of corporate powers could not properly be raised in the suit to set aside the Commission's order.

In *Cleveland, etc. R. Co.* v. *United States,* 275 U. S. 404, the Commission had made an order requiring the Railroad Company to make switch connections with the tracks of a coal company, the authority of the Commission being limited to the construction of such connections with private side tracks. The order was challenged on the ground that a state statute, which had been upheld by the state Supreme Court, declared the tracks of the coal company to be public tracks. The Commission, however, made its order without passing upon the validity of the state statute, and its order was affirmed by this court on a holding that the state court judgment could not affect the Commission's jurisdiction.

In *Missouri Pacific R. Co.* v. *United States,* 4 Fed. Supp. 449, it was claimed that the order of the Commission authorizing the Southern Pacific Company to acquire control of the St. Louis Southwestern Railway Company was void upon the ground, among others, that it had the effect of annulling and abrogating an agreement known as the Gould-Huntington Agreement. The Commission had

declined to pass upon the validity of the agreement, saying (180 I. C. C. 175, 203) that its order must be based upon the public interest; that it was not within its province to construe the agreement or adjudicate the rights of the parties thereunder; that the question was whether the acquisition of control sought was in the public interest and that the status of the parties under the agreement should rest with the courts. The existence of the agreement was again urged upon the District Court as a ground for setting aside the Commission's order; but that court, in denying the claim, said (p. 456):

> "Even if it were conceded that the Texas & Pacific had rights under the Gould-Huntington agreement which the acquisition of control of the Cotton Belt by the Southern Pacific might result in the violation thereof, the commission had power to make the orders complained of upon its determination that the public interest called for such acquisition. *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467; *Kansas City Southern R. Co.* v. *United States*, 231 U. S. 423; *New York* v. *United States*, 257 U. S. 591."

The decision of the District Court in this case was affirmed by this court in a *per curiam* opinion on October 22, 1934, ___ U. S. ___.

Petitioners only desire the Commission to take the same action in the case at bar as it took in the foregoing cases; that is to say, we desire it to pass upon the question of the alleged discrimination and prejudice. If the claimed violation of law is found to exist, the Commission should enter an order prescribing what is to be done, without regard to the operating agreement. The question of what would then happen under the agreement, as between the proprietary lines, could be left to the courts, if necessary, just as the Commission said should be done in *St. Louis Southwestern Ry. Co. Control*, 180 I. C. C. 175, 203. The Terminal Company has indicated some questions which might arise (pp. 58, 59, its brief), but it is not necessary for

the Commission to consider these matters, nor are the possibilities suggested by counsel important in this case. The power of the Commission to cure an existing law violation cannot be limited by such considerations.

Under the foregoing decisions and the cases cited in our original brief (pp. 48, *et seq.*), the Commission surely has power to make an order prohibiting unlawful prejudice and discrimination, even though it may result from the operation of a contract. That power was first established by this court in the *Mottley Case,* 219 U. S. 467, 482, and has been repeatedly followed. In *Sutter Butte Canal Co.* v. *Commission,* 279 U. S. 125, this court, in speaking of the *Mottley Case, supra,* said, at page 138:

> "In that case it was held that the power of Congress to regulate commerce among the states, which is analogous to the police power of the states in regulating public utilities, extended to rendering impossible enforcement of contracts made between carriers and shippers, although valid when made, because they were all made subject to the possibility that even if valid when made, Congress might, by exercising its power, render them invalid."

One of the most recent expressions of this court on this subject is in *Nebbia* v. *New York,* 291 U. S. 502, where this court said at page 523:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

Since petitioners' attack before the Commission was not upon the operating agreement but upon a claimed discrimi-

nation and prejudice violative of the act, the argument of respondents on this point necessarily falls. This court is not called upon, as respondents say, to invest the Commission with a new far-reaching power to modify or annul contracts, but is only asked to require the Commission to exercise its power to hear and determine a case involving a discrimination and prejudice alleged to be in violation of the law.

The decisions of this court in *Interstate Commerce Commission* v. *Los Angeles,* 280 U. S. 52, *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Co.,* 288 U. S. 14, and *Texas* v. *Eastern Texas R. R. Co.,* 258 U. S. 204, cited by respondents, have no application to the case at bar. In the *Los Angeles Case,* the Commission was said to have power to require the building of a gigantic union station costing many millions of dollars. In the *Oregon-Washington Railroad & Navigation Co. Case,* the Commission had claimed power to require the building of a railroad at large cost into a territory which the defendant company had not undertaken to serve, and which railroad could only have been operated at a loss. In the *Texas Case,* it was sought to invest the Commission with power to deal with intrastate commerce, independently of its effect on interstate and foreign commerce. These were powers of the broadest type; were new in every sense of the word, and the claim that they existed was not founded upon any language of the Interstate Commerce Act. On the other hand, the power of the Commission to deal with discrimination and prejudice must surely be conceded by now. That power was recognized in the cases cited by respondents. As was said in the *Los Angeles Case,* 280 U. S. 52, at page 62, the Commission, while denying its jurisdiction, was careful

to point out that no question of discrimination or preference had been presented to it.

We submit that under the foregoing it should be held that the language of paragraphs (1) and (3) of the Interstate Commerce Act is sufficiently broad to confer upon the Commission power to deal with and correct such prejudice and discrimination as is alleged by petitioners to exist at Kansas City; and that neither the existence of the operating agreement nor the ownership of stock of the Terminal Company by petitioners can be given the effect of depriving the Commission of that jurisdiction, a jurisdiction which it must be held to have if the purposes of Congress, as repeatedly announced by this court, are to be fulfilled.

With respect to paragraph (4) of Section 3 of the act, all respondents present the same argument. This argument reduces to the claim that petitioners are not such carriers as may take advantage of the paragraph, for the reason that the operating agreement now gives them the right to use the facilities of the Terminal Company upon payment of the amounts prescribed by that agreement. On this point we can add nothing to what was said in our main brief (pp. 33, *et seq.*).

We submit that the error of respondents lies in their assumption that the compulsion which they insist is necessary, must exist with respect to physical use only and not with respect to the compensation to be paid for that use. It seems to us that the required compulsion may exist either with respect to the physical use or with respect to the compensation to be paid for such use, since it is obvious that both must be dealt with to make effective any exercise of power by the Commission under paragraph (4).

If it be conceded that the right to use and the com-

pensation to be paid for such use are of equal importance under paragraph (4), as they certainly are, it seems plain that the jurisdiction of the Commission should exist to determine either issue independently of the other. Respondents' argument compels the conclusion that if petitioners declined to pay the charges required by the Kansas City operating agreement, and were by reason thereof barred from the use of the facilities of the Terminal Company, their right to reacquire that use under Section 3 (4), upon the payment of compensation to be fixed by the Commission, would be admitted. We cannot follow a construction of the law which denies a jurisdiction under that paragraph merely because petitioners have failed to violate the terms of the agreement.

The question of public interest.

We refer to this subject because of the relative importance given it in respondents' brief. The Terminal Company takes the position in its brief (pp. 64, *et seq.*) that the holders of the bonds of the Terminal Company are such parties in interest that they were entitled to be heard in the proceedings before the Commission; that any order of the Commission which might reduce the payments of petitioners on account of interest and tax charges of the Terminal Company, in order to remove an unlawful discrimination and prejudice, would deprive those bondholders of their rights contrary to law.

The brief of the Commission suggests (p. 43) that some bonds of the Terminal Company were sold after the Commission made its report and order of November 10, 1925; that these bonds were probably purchased by the public upon the faith of the Commission's decision; and that the purchasers of those bonds would, therefore, be prejudiced in the event of any decision in the case at bar which might result in granting to petitioners any reduction in the charges now paid by them.

We concede that the holders of the bonds of the Terminal Company are entitled to the benefit of every clause of the indenture securing their bonds, but fail to see how their rights would be affected by the entry of an order such as petitioners requested. Those bondholders may now have the right to look to the solvent users of the Terminal Company's facilities for the payment of the principal of and interest on the Terminal Company's bonds held by them, but the granting of the relief requested by petitioners would not affect this right.

As we pointed out in our original brief (pp. 55, 56), the bondholders are interested in receiving their money from the Terminal Company which issued the bonds. Under the operating agreement, any amounts which should be but are not paid by a using company must be made up by the remaining companies, so that at the present time a bondholder has no way of knowing what proprietary lines will contribute the money he receives from the Terminal Company, nor in what proportions the proprietary lines will make their contributions. Thus, so far as the bondholder is concerned, the situation under such an order as petitioners suggest would be the same as the situation which now obtains.

If such an order were made and every proprietary line of the Terminal Company except petitioners thereafter defaulted its obligations under the operating agreement, petitioners would be required to pay all obligations of the Terminal Company so long as they were able, either on a user, numerical or some other basis. These considerations make it plain that petitioners have requested nothing which will injure any holder of the securities of the Terminal Company, and this being so, it is unnecessary to give consideration to the question of what the legal rights of such security holders might be if something else were proposed to be done.

Other contentions of respondents.

It is faintly suggested in the brief of the Terminal Company (pp. 88, 89) that the case is moot and also that it should be disposed of on the ground of petitioners' laches. These matters are dealt with in our main brief. (pp. 56, *et seq.*, 61, *et seq.*) The Terminal Company does not urge these points with any insistence, and we submit that the argument heretofore presented in our main brief with respect to them fully answers the suggestions made.

It is further suggested by the Terminal Company (p. 87, its brief) that the intervening petitions filed with the Commission by petitioners unduly broadened the issues in violation of the Commission's rules, and that the Commission should have dismissed them for that reason. On this point it is sufficient to say that no matter what the Commission might or should have done, it did not dismiss these petitions because they were in violation of any of its rules. On the contrary, it received the petitions and a motion to dismiss them, reserved the motion to dismiss until the hearing on the merits, and thereafter dismissed the petitions, not because they broadened the issues, but on a holding that the Commission had not the power and authority to grant the relief requested or that relief which the Commission thought was requested. The failure of the Commission to dismiss the petitions on the ground that they unduly broadened the issues concludes the Terminal Company, and it may not now be heard to complain of the Commission's action in this respect.

All briefs for the respondents also present a substantial volume of argument said to show that the unlawful prejudice and discrimination alleged by petitioners does not in fact exist. In our brief (pp. 44, *et seq.*) we make some reference to the facts, but only for the purpose of giving point to our argument in support of the power of the Com-

mission to grant the relief requested by petitioners. We assume that the ascertainment of facts to prove or disprove the unlawful prejudice and discrimination alleged by petitioners will be left to the Commission, and that it is, therefore, unnecessary to argue those facts to this court.

We only wish to direct attention to the fact that in deciding on the petition of the Missouri-Kansas-Texas Railroad (198 I. C. C. 4), the Commission was required, under Section 3 (4) of the Act, to fix the amount to be paid by that railroad "on the principle controlling compensation in condemnation cases." Its conclusion that the user basis could not be used was reached because of this statutory requirement. Moreover, petitioners have never insisted upon the user method of distributing the tax and interest charges of the Terminal Company as being the only method of curing the discrimination and prejudice alleged to exist. The determination of what is necessary to produce that result will, we assume, be left to the Commission should this Court conclude that the writ prayed for should issue.

As a final answer to the relief which petitioners have requested, the Terminal Company, in concluding its brief (pp. 98, *et seq.*) urges that a decision supporting the claims of petitioners with respect to the Commission's jurisdiction will produce a "swarm" of similar controversies; that contract and property rights and agreements will be disrupted with "a complete destruction of all confidence in the written word." This argument has been made many times. A complete answer to it was made by this Court in *United States, ex rel.* v. *Delaware & Hudson Company*, 213 U. S. 366, which case involved the constitutionality and meaning of the so-called commodities clause. Dealing with a similar argument there made, this Court said, at page 405:

> "We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, if it be

susceptible of the construction which the government has placed upon it. We do this because, obviously, mere suggestions of inconvenience or harm are wholly irrelevant, as they cannot be allowed to influence us in determining the question of the constitutional power of Congress to enact the clause."

Obviously, the determination of the issues presented herein cannot be made to depend upon the considerations suggested by counsel, nor upon the further assertion that if petitioners are unsuccessful, all pending litigation arising out of the operating agreement will be terminated.

Conclusion.

The operating agreement relating to the use of the properties of the Terminal Company by petitioners and the other proprietary lines of the Terminal Company has approximately one hundred and seventy-five years to run. It is plain that the burdens imposed upon petitioners under this agreement are extremely serious. While respondents have indicated some doubt as to the correctness of the figures contained in Petitioners' Exhibit 2, attached to the petition in the Supreme Court of the District (R. 60), the report of the Commission itself (R. 88) affirmatively shows the extent of the burden under which petitioners have been and are now laboring. This burden will continue for the full term of that agreement, unless the Commission has the power which we contend it has.

In the last analysis, respondents' contentions on the question of the Commission's jurisdiction reduce to the claim that the operating agreement itself is of such sanctity that no matter what law violations and other improprieties may result from its operation, petitioners can secure no relief from any source. We submit that this cannot be so, under the law as consistently construed and applied by this court.

The judgment of the Court of Appeals should be reversed with directions that the writ of mandamus prayed for be issued.

Respectfully submitted,

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AUG 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 234

THE UNITED STATES OF AMERICA, EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; AND MISSOURI PACIFIC RAILROAD COMPANY,
Respondents.

BRIEF OF RESPONDENTS, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; AND MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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The Legal Questions Discussed in This Brief.

First. Can the construction of a law by the Commission, which is charged with the duty of administration of such

law, in a case of grave doubt, be controlled and reviewed through an action in mandamus?

Second. Did the Commission correctly construe the law as applicable to the case made by Petitioners?

The court proceedings which followed the action of the Commission in which decisions have been rendered and which decisions are sought by petitioners to be reviewed by this Court have for their purpose the determination of these two questions.

If the answer to the first question is in the negative, it follows that writ of certiorari will be denied. This for the reason that the decision of the Supreme Court of the District of Columbia denying the writ of mandamus, which decision was affirmed by the Court of Appeals, was right and will not be disturbed.

If the answer to the second question is in the affirmative, the writ of certiorari will be denied by this Court because there is no occasion to review a correct construction of the law by the Commission, which construction has been approved by the Court of Appeals, and as against which there are no conflicting decisions.

By motion to dismiss the intervening petitions of the petitioners filed before the Commission in the case of *Missouri-Kansas-Texas R. R. Co.* v. *Kansas City Terminal Ry. Co.*, 104 I. C. C. 203, an issue of law was joined involving the power and authority of the Commission to grant the relief sought by petitioners. In deciding the motion, it was necessary for the Commission to examine and construe the law which creates and defines its powers. After an opportunity to be heard had been afforded to all parties and after argument of counsel for and against the motion, the Commission construed the law as not conferring upon it power and authority to grant the relief sought. Having so construed the law, it dismissed the intervening petitions.

GENERAL STATEMENT.

Only such facts will be stated herein as to enable the Court to comprehend the case as presented to the Interstate Commerce Commission (hereinafter sometimes called the Commission).

On and prior to January 12, 1909, twelve railroad companies which operated lines of railroad entering into and/or passing through Kansas City, Missouri-Kansas, owned severally or jointly, as the case may be, the stations, yards, and terminal facilities necessary or convenient for the transaction of their respective railroad business. On and subsequent to that date, these twelve railroads decided to combine and enlarge these facilities and to construct the necessary buildings, tracks, bridges, union station, and extensive freight terminals, and to do all things necessary or convenient to the accomplishment of the enterprise. This was accomplished through the instrumentality of the Kansas City Terminal Railway Company, a corporation (hereinafter sometimes called the Terminal Company). Conveyances of property were made by the respective carrier owners to the Terminal Company. Additional lands were acquired, street vacations secured, overpasses and underpasses constructed, union station building erected, and necessary capital was acquired through the issuance of stock and bonds and the execution of deeds of trust. The project became in due course an accomplished fact. By the various instruments shown in the transcript of record in this case, the rights, privileges, and obligations of the twelve railroad companies and all parties signatory thereto are prescribed and defined. The twelve railroad companies which are signers of the various instruments will be referred to herein as proprietary companies. The various agreements will be called herein contracts. The contracts

provided (through distribution of Terminal Company stock) for equal ownership, equal control, equal voice in the management, equal vote as to expenditures on betterments and extension, equal privileges, and equal non-discriminatory use of the property and appurtenances as between the proprietary companies. The contracts provided for the admission of other railroads which might apply for the use of the property and facilities. Each proprietary company had an equal voice and vote in the matter of admittance of other railroads. Any other railroad could be admitted upon written consent of two-thirds of the proprietary companies. Upon admission of any other railroad, such railroad company would have equal rights and privileges and equal obligations with the proprietary companies. All money obligations of the Terminal Company necessary to be paid in order to protect the title to the consolidated property against hazard of seizure or foreclosure is to be paid in equal parts by the proprietary companies. Such obligations included principal of bonds at maturity, interest on bonds at accrual date, and taxes on the property on the due date. Upon such obligations, so payable by the proprietary companies in equal parts to protect title of the consolidated properties, there is to be credited in equal parts the net earnings of the Terminal Company from rentals, privileges, and operations during the accounting period. In order to assure the marketing of the bonds at the best terms possible, the stock of the Terminal Company owned by each proprietary company in equal number of shares (except directors' qualifying shares) was deposited with the trustee as an assurance of equal control by the proprietary companies, the operating agreement was deposited with a trustee, and a deed of trust or mortgage placing a lien upon the property was executed. In order to enhance the market value of the bonds and further to protect the title to the property, it was agreed that if any proprietary company should default in the payment of

its share of the taxes, principal, or interest on the bonds, such defaulted sum should be paid by the non-defaulting companies in equal parts. The hazard to the title in the property of the Terminal Company and, collaterally, the title in common of the proprietary companies, was thereby reduced to the minimum.

All other expenses, such as expenses for maintenance of way and structures, maintenance of equipment, transportation expenses, and general expenses, such as salaries and wages of employes, are paid by the proprietary companies on a wheelage or user basis. Principal and interest on short-term notes for money borrowed by the Terminal Company necessary to meet current operating expenses or for other purposes are also divided among the proprietary companies on a wheelage or user basis.

The Missouri-Kansas-Texas Railroad Company Status.

The Missouri, Kansas *and* Texas *Railway* Company was a party to all of the matters and things mentioned above under the heading "General Statement." That company signed all the instruments shown in the record effecting the creation, organization, management, and operation of the Terminal Company. On or about September 27, 1915, a creditors' bill was filed in Court against the Missouri, Kansas and Texas Railway Company and a receiver was appointed. Later the Central Trust Company of New York, as trustee under a deed of trust or mortgage, brought an action of foreclosure and for the appointment of a receiver. The two cases were consolidated and a receiver appointed (294 Fed. 32). In due course a decree of foreclosure and order of sale was entered. The decree of sale, among other things, provided that the purchaser at the sale should have the privilege, within a year from the date of delivery of deeds and taking possession of the properties, of electing to adopt or reject any executory contracts to which the old

company was a party. It was also provided that no mere conduct or user of the rights within that period was to conclude the purchaser in respect of such election (Rec., 117). The purchaser at the sale caused to be organized a corporation under the name of Missouri-Kansas-Texas Railroad Company to take over and operate the property purchased. Within the time fixed by the decree, the Missouri-Kansas-Texas Railroad Company filed its election not to adopt the agreement of the Missouri, Kansas and Texas Railway Company (Rec., 118). The Missouri-Kansas-Texas Railroad Company, being without facilities at Kansas City, petitioned the Interstate Commerce Commission for an order pursuant to the provisions of Paragraph (4) of Section 3 of the Interstate Commerce Act to accord petitioner the right to use designated portions of the union passenger and freight terminals at Kansas City, Missouri-Kansas. Pending final disposition of the case and to meet the emergency, a temporary order was issued pursuant to Paragraph (15) (c) of Section 1 of the Interstate Commerce Act (Rec., 95-96). This case was given a Commission docket No. 15682. The Missouri, Kansas and Texas Railway Company, on account of the elimination of its interest by foreclosure, took no part in the case. The eleven remaining proprietary companies filed intervening petitions before the Commission and, in so far as they chose to do so, participated in the proceeding. The Atchison, Topeka and Santa Fe Railway Company, The Chicago, Burlington & Quincy Railroad Company, The Chicago, Rock Island and Pacific Railway Company, the Missouri Pacific Railroad Company, and the Union Pacific Railroad Company intervened in the case in opposition to the relief sought by the petitioner. The other proprietary companies intervened in the case. Some of the interveners sought to obtain the same relief as to terms that was sought by the petitioner. The petitioners in this case were among the

interveners seeking the same relief as that which was sought by the Missouri-Kansas-Texas Railroad Company. (Rec., 97-98.) The Commission, having determined that it could not grant the relief sought by petitioners, dismissed their petitions. (Rec., 117.) Since this case was lodged in the Supreme Court of the District of Columbia, the Commission, under date of November 13, 1933, has made and entered its final report and order in the case of Missouri-Kansas-Texas Railroad Company *vs.* Kansas City Terminal Railway Company. Under the terms of that final order the Missouri-Kansas-Texas Railroad Company is to pay certain compensation computed upon the allocated property upon a unit basis and operating expenses upon a wheelage or user basis.

ARGUMENT.

1. The Construction of the Law by the Commission, Which Is Charged With the Duty of Administration of Such Law, in a Case of Grave Doubt, Can Not Be Controlled and Reviewed Through an Action in Mandamus.

The Interstate Commerce Act does not provide in clear and unmistakable language for the exercise of the power sought. In order to determine the statutory existence or non-existence of the power, it was necessary for the Commission to resort to a construction of the law. There is no occasion for construction where the language of a statute plainly declares the legislative intent. The fact that construction was resorted to in this case is evidence that there was grave doubt as to legislative intent. The construction of a statute by the department charged with its administration calls for the exercise of judgment and discretion. The performance of these judicial functions is not subject to control by mandamus.

The case at bar is controlled by the doctrine established by this Court in the case of *Wilbur* v. *United States,* 281 U. S. 206. The question in the *Wilbur* case was whether certain funds resulting from the sale of Indian lands were tribal funds or trust funds. If tribal funds, the proceeds thereof were distributable among the enrolled members of the tribe who maintained their tribal status. If trust funds, the proceeds were distributable among the owners in common of the property sold, and their offspring. The Secretary of the Interior was charged with the duty of the administration of the law and of determining who should be enrolled as distributees. One secretary held the fund to be a trust fund and caused to be enrolled certain children of an Indian mother who had lost or abandoned her tribal

status, and permitted such children to participate in the yearly distribution of the proceeds. Secretary Wilbur, coming into office later, held the funds to be tribal funds and caused the names of these children to be stricken from the rolls because of the absence of tribal status. These were two directly opposite constructions of the same law. By the first construction, rights in property were declared. By the second construction, the same property rights were denied. An action in mandamus was instituted to require the Secretary to re-enroll these children on the ground that he had no power to change the ruling of his predecessor in office whereby rights had been declared and upon the further ground that he had misconstrued the applicable law. Mandamus was denied by the trial court and, on appeal, allowed by the Court of Appeals. This Court reversed the decision of the Court of Appeals and affirmed the decision of the trial court. This Court, speaking through Mr. Justice Vandevanter, said (218, 220):

> "• • • Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."
>
> "'• • • Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded.'"

In the case at bar no prescription of law equivalent to a positive command requiring the Commission to act in the premises can be found. Its power or lack of power to act must be determined by the exercise of judgment and discretion in the construction of the applicable law. Freedom

from doubt is absent. There exists grave doubt. Such construction, right or wrong, can not be controlled by mandamus.

In the case of *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, denial of mandamus was approved by this Court upon the following state of facts. A shipper filed a complaint with the Commission alleging the collection of rates which were prejudicial to complainant and preferential of competitors in violation of Section 3 and seeking damages alleged to have resulted from such violation. The Commission found prejudice and preference to exist and ordered a removal thereof. It further found that "the record will not support an award of reparation based upon the undue prejudice found to exist." Action in mandamus was brought in the Supreme Court of the District of Columbia on the ground that the Commission had committed an error of law. The writ was denied by the trial court. The Court of Appeals reversed the trial court and held that the writ should issue. This Court reversed the decision of the Court of Appeals and sustained the decision of the trial court. This Court, speaking through Mr. Justice Cardozo, said (393):

> "* * * Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact."

In the case at bar, the Commission, being unable to find any prescription of law free from doubt and equivalent to a positive command, was under the necessity of construing the law which it was created to administer. Construction of the law is a judicial function requiring the exercise of judgment and discretion. Error in the exercise of such a function can not be controlled by mandamus.

The case of *Interstate Commerce Commission* v. *Humboldt Steamship Company*, 224 U. S. 474, cited by petition-

ers, is not contrary to or inconsistent with the cases above cited. The ultimate question in the *Humboldt* case was whether Alaska is a territory of the United States within the meaning of the Interstate Commerce Act, as amended. The Commission held Alaska was not such a territory and, therefore, that the powers granted to the Commission could not be exercised in a case alleging violation of the Act by an Alaskan railroad. If Alaska be such a territory, the Act specifically authorized the Commission, upon a proper record, to exercise the powers which the complainants had sought. The Court found that the Commission's ruling was contrary to a long line of decisions of this Court defining the territorial status of Alaska. This Court, having already construed the law, it was the duty of the Commission to apply the law as construed. Where this Court, by interpretation of the law, has removed the doubt and uncertainty, there is no occasion for commission construction. The Court therefore granted the writ requiring the Commission to take jurisdiction. The question in the *Humboldt* case was not lack of prescribed power, but the territorial scope within which the clearly defined power could be exercised.

In the case at bar the question before the Commission was whether or not the power sought to be exercised could be found in the law. It exercised a judicial function in construing the law and found no such power prescribed therein.

The case of *United States, ex rel. Louisville Cement Company* v. *Interstate Commerce Commission*, 246 U. S. 638, cited by petitioners, is in line with the decision in the *Humboldt* case. The *Cement* case arose prior to the Transportation Act of 1920. The law then in effect provided that complaints for damages shall be filed with the Commission "within two years from the time the cause of action accrued and not after." This Court has held that this provision is

not merely a statute of limitations but is jurisdictional. The only matter of doubt that could or did arise in the *Cement* case was as to when the cause of action accrued. The complaint was filed more than two years after delivery of the shipments but within two years of the payment of the charges claimed to be illegal. The Commission construed the time of accrual of the cause of action to be the date of delivery of the shipments. Prior to the time this case reached the courts, this Court had judicially construed this statute, defining the accrual of the cause of action to mean the date of payment of the charges found illegal. This Court had therefore removed the doubt and had taken away the necessity for a construction of the statute by the Commission. The statute having been construed by this Court and the doubt being removed and the Commission's duty under the law having been made clear, its future action in the premises became ministerial in character and was therefore subject to be controlled by mandamus.

The case at bar is so far removed from any similarity to the *Cement* case or to the *Humboldt* case that these cases are not helpful.

2. The Commission Correctly Construed the Law as Applicable to the Case Made by Petitioners.

The construction of the law by the Commission was approved by the Court of Appeals in the following language (71 Fed. (2d) 336, 340):

> "• • • But appellants tell us that the statute is broad enough and that, in the view they are entitled to take, the refusal of the Commission to grant the relief is not grounded on a misinterpretation of the statute, but is in every respect a denial of jurisdiction. In support of this they quote from the opinion certain statements to the effect that 'the power and authority thus invoked are not conferred by the quoted paragraph (the statute),' and again, 'we are unable to find the

requisite power or authority in any other provision of the act,' and 'we are unable to spell out from that provision such a jurisdiction.' These statements they say indicate the view of the Commission that it was without jurisdiction. But we think the appellants' position in this respect is grounded upon a mistaken theory. It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask. The Commission is an administrative body and can exercise only the powers delegated to it by Congress, but in the application and interpretation of the powers conferred it exercises judgment and discretion, and it was clearly in the exercise of these that it used the language in the quoted sentences above. If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion. And we may remark in passing that, to justify the Commission in the exercise of such authority as is asked, the right to do so should be expressed in clear and certain language. Congress has conferred on the Commission broad powers for the purpose of avoiding discriminations, preferences, and inequalities, and has likewise given it power to regulate the interchange of traffic and the distribution of cars, to revise extortionate exactions under trackage agreements, to enforce the use by one carrier of the terminal facilities of another, and indeed to take all necessary steps to maintain an adequate railway service, but it is going too far to say that all or any of these powers themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist. The case is, of course, different if the contract either then or subsequently violates a specific law of the United States. Cf. *Louisville & N. R. R.* v. *Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671. In cases in which it does not, it may well be that only the most pressing public necessity would justify the Congress in delegating to an administrative body jurisdiction to destroy a valid contract and substitute another of its own making, and the Commission would not be justified in assuming

Congress had done so except when authority was clear, for the inviolability of contracts is a cardinal principle of our business and social life. The states are forbidden to pass any law impairing them, and as far back as the ordinances for the government of the Northwest Territory it was stated as a primary principle that, in the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force, that shall in any manner whatever interfere with or affect private contracts or engagements bona fide, without fraud, previously made. This is no more than the recognition of a fundamental principle, as true now as then, that contracts, as vesting rights of property, ought to be protected from interfering legislation."

A. The Power in the Commission Sought by Petitioners is Not Granted by Specific Statutory Enactment.

The Interstate Commerce Commission was created by statute and can only exercise such powers as were delegated to it by the law which created it, or which are delegated to it by acts amendatory thereto.

The Interstate Commerce Act by appropriate provisions has specifically provided the circumstances and conditions under which the Commission may determine the joint or common use of the terminals of one carrier or carriers by another carrier or carriers. The first of these povisions is found in Paragraph (15) of Section 1. It reads in part as follows:

"(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may

> determine: * * * (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; * * *."

The Commission found that the Missouri-Kansas-Texas Railroad Company was without adequate terminal facilities at Kansas City; that it was using the terminals as a tenant at will without contract or agreement; and that there was a failure to agree as to terms as between the owners of the terminals and the petitioner. It issued its service order requiring the owners to permit the use under terms and conditions mentioned in the order until a hearing could be had and the terms and conditions of such use could be fixed by the Commission.

There is and can be no contention by the petitioners that they come within the terms of this statute. They were at the time of the intervention and still are (through stock ownership) the joint and common owners and users of the very terminals in question. The terms and conditions of the ownership and use of the terminals had long since been agreed upon under contracts duly executed by the petitioners. There existed no emergency calling for the action of the Commission. In fact, no emergency is claimed.

The second provision of the Interstate Commerce Act is found in Paragraph (4) of Section 3, which reads as follows:

> "(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use

of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

The conditions precedent to the exercise of the power conferred by this section are three. *First,* there must exist a terminal owned or controlled by a carrier or carriers which is more than adequate to the substantial handling of the owning carriers' business. *Second,* the applicant for use must be "another carrier or other carriers." These words, "another carrier or other carriers," can have no meaning in the statute except as they apply to a carrier or carriers which have no ownership and which are not entitled to the enjoyment of the terminal facilities involved. *Third,* there must be a failure to agree upon the terms and conditions of use.

The petitioners do not meet these conditions precedent to action on the part of the Commission. That the terminals are adequate to meet the requirements of the pro-

prietary lines is not disputed. The Commission has found that they are also adequate to meet the additional requirements of the Missouri-Kansas-Texas Railroad Company, a non-proprietary line. The petitioners are not "another carrier or other carriers" in the meaning of the statute. They are the joint owners and are perpetually entitled to the joint use of the very terminals involved. The terms and conditions of the joint ownership and use have been reduced to writing in contract form and have been duly executed and solemnly acknowledged by petitioners.

Concerning the relationship of the petitioners to the project, which was consummated by the contracts, the Commission says:

> "While the Great Western appears to have been invited to join in the project, the Kansas City Southern early and peremptorily demanded admission." (Rec., 110.)

The very contract itself provides that there shall be no discrimination as between the proprietary companies as to the full and unlimited use and enjoyment of the terminal property and its facilities. Petitioners make no charge of any violation of the terms of the contract. If they did, an action for damages would lie in a court of law and not before the Commission. They do not charge that the execution of the contract was procured by misrepresentation or fraud on anybody's part, nor do they charge that the contract as written and executed does not fully express the agreement of the parties. If they did, action to rescind or reform the contract, as the case might be, would lie within the powers of a court of equity and not with the Commission. The Commission is not given equity powers by the Interstate Commerce Act. It certainly has not been given powers broader than those of a court of equity.

"• • • Equity may compel parties to perform

their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same."

Hunt v. *Rhodes, et al.*, 1 Pet. 1, 14 (26 U. S. 1, 12).

B. The Relief Sought by Petitioners Before the Commission.

Petitioners seek to have the Interstate Commerce Commission by order compel the use of terminals which are already jointly owned by them and the other proprietary companies under terms and conditions different from those provided in the contracts. They seek to have the Commission by order rule that the contracts are not binding as to them. Such an order would not relieve the other parties to the contracts of their contract obligations. Stated in another way, the petitioners seek to have the Commission by order authorize partial default in payment of obligations which the parties have jointly and severally agreed to pay. Petitioners frankly admit the consequences of such an order as applied to the year 1932 and as disclosed by Exhibit 2 (Rec., 84).

The correctness of Exhibit 2 is denied in the answer of the Terminal Company. It is referred to herein as illustrative of the consequences if petitioners' contention could be sustained.

Each of the lines using the terminal under the contract agreed to pay bond interest in the sum of $165,821.03, less credits from operation to which each is entitled in equal shares. They each agreed to pay taxes in the amount of $40,661.33. Petitioners seek an order of the Commission which would affect the obligations of the parties to the same effect as if the contract were to read in such a manner that the Santa Fe instead of agreeing to pay $206,482.36

to cover its equal share of the bond interest and taxes would pay $599,665.32. By the same token, the Chicago Great Western, instead of paying as it did under the contract $206,482.35, would pay as though the contract provided for payment of $60,057.57 or, in other words, $130,779.39 less than the contract obligations which it had assumed. Similar changes would result as to the other proprietary companies.

Exhibit 2 (Rec., 84), as is well known to petitioners, does not present the true picture and is misleading. The interest on bonds amounted to $1,989,852.22 and was charged to each of the twelve lines in equal shares upon a unit basis. The credit from income of the Terminal Company, amounting to $176,731.67, was allocated to each of the twelve companies equally on a unit basis. The taxes on the property were also divided among the twelve companies equally on a unit basis. The operating expenses amounted to $1,789,572.71, and the interest on other indebtedness, amounting to $41,368.75, was divided among the twelve companies on a wheelage or user basis. The net result was that for the year 1932, the twelve companies paid a total sum of $4,090,537.67. This sum was paid by the respective companies as per the following table:

		Per Cent
A., T. & S. F.	$ 665,407.74	16.27
Alton	278,947.27	6.81
C., B. & Q.	345,781.79	8.45
C. G. W.	236,137.60	5.77
C., M., St. P. & P.	236,596.61	5.78
C., R. I. & P.	507,817.15	12.42
K. C. S.	229,362.11	5.61
M-K-T	263,634.81	6.45
M. P.	495,269.48	12.11
St. L.-S. F.	258,961.58	6.33
U. P.	309,195.17	7.56
Wabash	263,426.36	6.44
	$4,090,537.67	100.00

The figures shown as to operating expenses and interest on other indebtedness are not shown in Exhibit 2, but such items are known to petitioners and we anticipate will not be disputed.

The contract provides that in event of default in payment of the allottable proportion of interest and taxes by any company, the non-defaulting companies will pay not only their allottable share but also, in equal parts, the share of the defaulting company (Rec., 66). Immediately upon the happening of such events, it is made the duty of the trustee under the stock trust agreement to demand and enforce payment by the defaulting company for the use and benefit of the paying companies (Rec., 142). If the Commission were to make the order as sought by the petitioners, such an order would be tantamount to an authority to petitioners to default in a contractual obligation. Upon such default, the trustee would be bound under the stock trust agreement to attempt to enforce the payment of such defaulted sum against the petitioners. In such an action the petitioners would no doubt attempt to plead the order as a defense. It can therefore be seen that by such an order as is sought by the petitioners not only would the operating agreement be abrogated but all of the agreements incident to and connected with the project would be abrogated. The entire structure upon the good faith of which the capital was subscribed and paid, the bonds marketed and sold, and the credit established will have collapsed. Such chaos and uncertainty would ensue as to cause bond values to tumble. The holders of such bonds would suffer the hazard of the possibility of orders from time to time issued by the Commission. If the Commission had power to make such an order as is sought by petitioners, it would likewise have the power to abrogate and modify such orders and to make other and different orders from time to time. Investments are not made and money

is not loaned upon any such hazards. The owners of these bonds are a component part of the public whose rights and interests are entitled to be considered and conserved. Under such an order or orders, the credit of the Terminal Company, built upon the very foundation of the various agreements, would be destroyed.

If the Commission can be held to have the power to grant the relief sought by the petitioners, then it must be held to have the power to grant the same relief to each of the proprietary companies. The petitioners seek to have the contracts abrogated and disregarded. They seek to have the Commission allot to them a joint use (not of all of the terminal facilities which they now enjoy in common with the other proprietors) of selected portions of such terminals upon terms other than those agreed to by contract. If each of the other companies sought and secured the same exercise of power, there would result not a unified terminal so valuable to the public but a loosely connected assemblage of terminals. Some of the parts might be used by one line, other parts by two lines, other parts by many lines, and still other parts by all lines, and still other parts by no line. Such action would result in an ill-defined hodgepodge. The public service and convenience, which was the underlying motive to the unification, would be thrown into the discard. It must not be overlooked that this vast terminal, created at great cost at public demand, by the voluntary action of the proprietary companies, can not be unscrambled and the parties placed in their respective positions occupied prior to the execution of the contracts. This is physically and legally impossible.

In the case of *Interstate Commerce Commission* v. *United States ex rel. Los Angeles,* 280 U. S. 52, in interpreting the power of the Interstate Commerce Commission under Paragraphs (18) to (21) of Section 1, the Supreme Court held that the Interstate Commerce Commission had

no power to compel railway carriers to abandon existing stations and terminals and to erect new ones in lieu thereof. The Court says, at Page 70:

> "When the interest of a great city in its improvements is to be promoted entirely at the expense of railroads that enter it, Congress would be expected to hesitate before it would change discretionary leave for the erection of such stations into positive command. In such a case the expenditure of a large amount of capital will not bring with it corresponding increase in the railroad revenues. If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act."

In the case of *Interstate Commerce Commission, et al. v. Oregon-Washington Railroad & Navigation Co., et al.*, 288 U. S. 14, the Court had before it the interpretation of Paragraph (21) of Section 1 of the Interstate Commerce Act. The pertinent part of that paragraph reads:

> "(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

In that case the Commission maintained that if it is found that the conditions stated in the proviso exist, the power given to compel a carrier "to extend its line or

lines" is unlimited and the way is open for an order to extend for any distance, at any cost, for the purpose of developing virgin territory or for supplying competition in a region served by other carriers. The Court says (35):

> "The phrase 'and to extend its line or lines' is part of a single sentence committing to the Commission the power to require carriers to provide safe and adequate facilities for car service as defined in the act. The reasonable conclusion is, therefore, that the extensions mentioned have to do with car service, and are not intended to create a wholly independent subject of jurisdiction. In the proviso the furnishing of facilities and extension of lines are blended as belonging in a single class. We should expect, if Congress were intending to grant to the Commission a new and drastic power to compel the investment of enormous sums for the development or service of a region which the carrier had never theretofore entered or intended to serve, the intention would be expressed in more than a clause in a sentence dealing with car service."

The Supreme Court has decided that the Commission is without power by order to compel the union of terminals and the construction of a union passenger depot by the carriers. The position of the petitioners is that after the carriers have voluntarily united the terminals and have constructed the union station and have voluntarily executed all of the agreements necessary or convenient to the accomplishment of the non-compellable enterprise, a power is thereby created in the Commission by order to compel dealings between the parties which it could not have compelled at the beginning. The purport of this contention is that the power in the Commission is created not by act of Congress but by the voluntary act of the carriers. This contention is contrary to the well-known rule that that which is forbidden to be done by direct action can not be accomplished lawfully by indirection. As the Commission did not have the power to compel the action taken by the carriers, their voluntary act could not create the power.

Jurisdiction of the subject matter not granted by law can not be conferred by voluntary act of the parties.

Another situation which would result from an order of the Commission upon the basis sought by petitioners is worthy of note. If the assumption of principal on bonds is to be changed from a unit basis (as per the contract) to a user basis by order of the Commission, the capital investment of each proprietary company would be taken entirely out of the hands of the management of such company and placed under the uncertainty of the caprice of others over whose action the investing company has no control. No doubt the managing officers of petitioners have a right to determine for themselves what is or is not a prudent investment for their respective companies. The law would have to be very specific in its terms before it could be held that petitioners have the right, through the device of a Commission order, to determine the investment which the Santa Fe shall make in terminal properties. Such far-reaching powers would certainly not be left to implication or analogy but would be stated by the Congress in very clear and unmistakable language in the Interstate Commerce Act.

Measure of ownership is controlled by measure of investment. Measure of control usually and customarily as a matter of right follows the measure of ownership. If the measure of investment and ownership were placed upon a user basis, the voting power of each proprietary company would change from time to time to the extent that any line might elect from month to month to increase or decrease its use of the terminal. We can find no section of the Interstate Commerce Act which either directly or by implication could be held to grant to the Interstate Commerce Commission jurisdiction to enter an order or orders which would have such far-reaching and drastic

effect and which would affect the interests of a multitude of people who are not before the Commission.

Clearly, the petitioners are not within the terms of Paragraph (15) (c) of Section 1 and are not within the terms of Paragraph (4) of Section 3 of the Interstate Commerce Act.

The petitioners are in effect contending that contracts lawful when made have become void and inoperative as to them by reason of a change in the law. If the contracts have become void by operation of law, they are void as to all parties. They can not be valid as to some of the parties to the contract and invalid as to others in the absence of incompetency at the date of execution. The validity of contracts is a judicial question subject to determination by the courts. It is not an administrative question to be determined by the Commission.

In the case of *Hedges* v. *Dixon County*, 150 U. S. 182, 192, the Court says:

> "Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake to so modify it as to make it legal and then enforce it."

In the case of *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. Ry. Co., et al.*, 76 Fed. 183, 184, the Court, in speaking of the powers conferred upon the Commission says:

> "• • • The interstate commerce commission is not invested, and cannot be invested, under the constitution, with either legislative power or purely judicial power. Its functions are necessarily restricted to the performance of administrative duties, with such quasi judicial powers as are incidental and necessary to the proper performance of those duties. • • • The right claimed is not an incidental right. It is not a right or power to be derived by implication or by construction from general phrases in the first or other

> sections of the act, nor can it be imported into the act by reference to or by reason of the necessities of the case. If found at all, it must be found in express and specific language, among the powers and rights granted in direct terms, and there is no such language in the act."

Petitioners seek to have the Commission declare the contracts void as to them, rewrite the contracts, and then by order enforce the contracts as rewritten. This a court of equity could not do. No such power is conferred on the Commission in "express and specific language."

The petitioners seek to have the contracts rewritten by the Commission so as to place them in what they imply would be an equitable position. Such action by the Commission would affect the rights and interests of parties not before the Commission and who can not be compelled to have their rights adjudicated by the Commission. The trustee under the deed of trust and the bondholders are under no legal compulsion to permit an adjudication of their rights by the Commission. The order sought by petitioners would change the duties of the trustee and modify the security of the bonds.

In the case of *Shields* v. *Barrow*, 17 How. 130, 142, 58 U. S. 137, 150, the court says:

> "* * * it being clear that the circuit court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons, and that the original bill ought to have been dismissed."

The right of proprietary companies (including petitioners) to make the contracts and their legality when made is not in dispute. The petitioners' contention is that there is no such present right, the right having been destroyed not by direct and express enactment but by implications of law.

In the case of *Adkins* v. *Children's Hospital*, 261 U. S. 545, 546, the Court says:

> "* * * That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause (Fifth Amendment to the United States Constitution), is settled by the decisions of this Court and is no longer open to question."
>
> "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."

See also *Missouri, Kansas & Tex. Railway Co.* v. *Oklahoma*, 271 U. S. 303.

It is worthy of note that the operating agreement, which is the real subject of attack by petitioners, is by its terms in line with the terms of a user contract decreed by the Supreme Court in the case of *St. Louis, Kansas City and Colorado R. R. Co.* v. *Wabash R. R. Co., et al.*, 217 U. S. 247, 254. The Wabash owned right of way, tracks, and terminal facilities in St. Louis. In the foreclosure proceedings against the Wabash, the St. Louis, Kansas City and Colorado railroad was decreed the right to a joint use of these tracks, terminals, etc. The value of the property was established. It was decreed that interest on this value and expense of keeping up the track should be paid on a wheelage or user basis. This decree was affirmed by the Court of Appeals, with a dissenting opinion by Judge Hook. The decree was reversed by the Supreme Court and the dissenting opinion of Judge Hook was approved and adopted. The language of the Supreme Court is as follows:

> " 'The final matter is that of compensation. In this I think the master erred. He fixed the value of the right of way at a million of dollars; and reported that, in his judgment, the share of the interest on this value

and in the expenses of keeping up the track, which the intervenor company should pay, should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track, I see no reason to doubt the justice of the rule fixed by the master, but in regard to the interest on the value, I think the intervenor should pay one-half of that, and for these reasons: It is a familiar fact that in a large city like St. Louis, along the track of an important railroad, within the city limits, are built large manufacturing establishments, warehouses and other buildings for the convenient transaction of business between the carrier on the one hand and the manufacturer and the merchant on the other. Another road coming over the same track not only uses the property, of great value, which the company owner has in the first instance paid for, but also shares in the benefit of access to all these manufactories, warehouses, etc. It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of this business, and it may share equally. Under those circumstances, it seems to me no more than fair that a new company, which crowds itself into an equal access to such benefits and such privileges, should pay an equal share of the interest on the value of the property. Hence I shall sustain the objections of the respondent to the report of the master, so far as concerns the amount of compensation, and I think that the intervenor company must pay one-half the interest on the value and its share of the cost of keeping up the track, determined upon a wheelage basis.'"

It has been held that change of the law and of state constitution may not destroy rights created by contract. In the case of *Russell* v. *Sebastian*, 233 U. S. 195, 204, 210, the Court says:

"* * * That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual or corporation a

property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court."

"We conclude that the constitutional amendment of 1911, and the municipal ordinances adopted in pursuance thereof, were ineffectual to impair this right, * * *."

Based upon the various agreements shown on the record in the case at bar, large investments have been made in property, in capital stock, and in bonds of the Terminal Company. These investments have created property rights in the investors. To hold that the Commission, at the behest of two of these investors, may abrogate or modify the agreements by reason of which and under the terms of which these investments have been made and these property rights have been created, would raise grave and serious doubts as to the constitutionality of an act held to grant such power. In the case of *State of Texas* v. *Eastern Texas R. R. Co., et al.*, 258 U. S. 204, 217, in interpreting the grant of power to the Commission under Paragraphs (18), (19), and (20) of Section 1 of the Interstate Commerce Act, the Court says:

"If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said, 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'"

In addition to the avoidance of interpretations which create doubtful constitutionality, the Court in determining the grant of power will also consider the far-reaching consequences of the exercise of such power. The interpreta-

tion of Paragraph (8) of Section 1 of the Interstate Commerce Act was before the Court in the case of *United States* v. *Delaware and Hudson Co.*, 213 U. S. 366, 414. This section is commonly known as the commodities clause of the Act. The Supreme Court held in that case that it is the duty of the Court to adopt the construction of a statute, if possible, which saves it constitutionality. The Court further says:

> "* * * And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the statement taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the Government not well founded."

C. THE POWER IN THE COMMISSION SOUGHT BY PETITIONERS CAN NOT BE IMPORTED INTO THE ACT BY NECESSARY IMPLICATION.

Petitioners, having failed to find the grant of power by clear and specific statutory enactment under Paragraph (4) of Section 3, seek to find the power by implication in Paragraphs (1) and (3) of Section 3.

Paragraph (3) of Section 3 contains one command and two prohibitions:

> 1. Carriers shall, according to their respective powers, afford all reasonable, proper, and equal facilities for interchange of traffic as between themselves and other connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith.

The record shows that this command has been fully complied with by the creation of an impartial Terminal Company, whose duty it is to be a convenient instrument for the facilitating of interchange, receipt, forwarding, and delivery of passengers and property between the proprietary lines.

> 2. Carriers shall not discriminate in their rates, fares, and charges between such connecting lines. The word "rate" as used in the interstate commerce law means the net cost to the shipper of the transportation of his property; it is the net amount the carrier receives from the shipper and retains. *Elliott* v. *Empire Natural Gas Co., et al.*, 123 Kans. 558; 256 Pac. 114, 117.

Section 6 of the Interstate Commerce Act requiring schedules of rates, fares, and charges to be filed with the Interstate Commerce Commission does not require schedules concerning free passes issued by virtue of Paragraph (7) of Section 1 to be filed, since "rate" means the net cost of transportation to the shipper, "fare" means the rate of charge for carriage of passengers, and "charge" means the price fixed or demanded for services rendered so that the act contemplates filing only where compensation is required. *Clark* v. *Southern Ry. Co.*, 69 Ind. App. 697; 119 N. E. 539, 543. There is no claim in the record that any shipper or passenger has had reason to complain as to the rates, fares, and charges collected by reason of the terminal arrangements.

D. Carriers Must Not Unduly Prejudice Any Such Connecting Line in the Distribution of Traffic That Is Not Specifically Routed by the Shipper.

Petitioners make no claim that the operating contracts have resulted in a violation of this clause. Such a charge would have to be based upon the conduct of the party or parties in dealing with specific unrouted shipments.

The power sought to be imported into the Act by implication is not found in the language of Paragraph (3) of Section 3.

Paragraph (1) of Section 3 deals with the relation of carriers to shippers and is not applicable to the relation of carriers to each other.

E. The Construction of the Statute by the Interstate Commerce Commission Should Be Adhered to.

The Interstate Commerce Commission has been charged with the duty of the administration of the Interstate Commerce Act. The Commission, in the first instance in which it has been called upon to construe Paragraph (4) of Section 3, has construed the Act as not conferring upon it the power to grant the relief sought by petitioners. The contemporaneous construction placed upon a statute by the officers or department charged with the duty of executing it is entitled to more or less weight. Such construction should not be disregarded or overturned except for the most cogent reasons and unless such construction is clearly erroneous. This rule is particularly applicable in cases, like the case at bar, in which vested rights are involved. This rule has been so long applied in the National Courts as to have become elementary. It is so well known as to require not citation of authorities.

Conclusion.

We respectfully submit that certiorari should be denied in this case:

First: Because the construction of the law by the Commission, which is charged with the duty of administration of such law, in a case of grave doubt, can not be controlled and reviewed through an action in mandamus. The Supreme Court of the District of Columbia committed no error in refusing to grant the writ of mandamus, and the Court of Appeals committed no error in affirming the decision of the trial court.

Second: Because the Commission correctly construed the law as applicable to the case made by petitioners. Such construction of the law is correct and was approved by the Court of Appeals of the District of Columbia and there are no decisions of the Commission or of the Courts establishing a contrary or conflicting construction.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 234.

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONERS,

VS.

INTERSTATE COMMERCE COMMISSION ET AL., RESPONDENTS.

BRIEF OF RESPONDENT, KANSAS CITY TERMINAL RAILWAY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE OPINION BELOW.

No written opinion was rendered by the Supreme Court of the District of Columbia. The opinion of the Court of Appeals is now reported as *United States ex rel.* v. *Interstate Commerce Commission*, 71 F. (2d) 336 (Advance Sheets of July 30, 1934).

STATEMENT.

This respondent is the corporate instrumentality by which the railroads entering Kansas City provided certain common terminal facilities. As such it is the record owner of the terminal facilities involved and was the defendant in the case brought before the Interstate Commerce Commission by Missouri-Kansas-Texas Railroad Company, in which these petitioners intervened.

A detailed statement is unnecessary. That of the Court of Appeals (R. pp. 245-249, 71 F. (2d) 336-338), except for a few conclusions, presents the basic facts very fairly. The petitioners' statement, while incomplete and not free from erroneous conclusions, is in the main substantially dependable. We desire to call attention, however, to a few allusions which might be misleading unless explained.

At page 2, reference is made to this respondent's union station and terminal facilities. The impression is created that the union station passenger facilities are the more extensive. The contrary is the case. The freight facilities are the more extensive (R. pp. 209-214).

At page 3, reference is made to the Terminal bonds, but petitioners omit to state that the Operating Agreement was pledged as additional security for these bonds (R. pp. 49, 50, 109, 139, 148). The impression created that all of the bonds were sold before the construction of the facilities is erroneous.

At page 4, an argument is based on Exhibit 2 attached to the petition filed in the Supreme Court of

the District of Columbia. The conclusions drawn from this exhibit were challenged by the answer filed by this respondent (R. p. 232).

At page 5, petitioners (apparently in support of their petition) undertake to state the grounds relied upon by the M-K-T in its complaint. But the Commission held that these alleged grounds were not within the issues. The issue was properly held to be just compensation, determined upon the principle controlling compensation in condemnation proceedings (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* 198 I. C. C. 4, 5, 6).

At page 6, reference is made to the dismissal of petitioners' intervening petitions, but petitioners omit to state that this was done only after a full hearing accorded to petitioners and the reception of all the evidence they had to offer (R. p. 111).

At page 7, it is stated that the essential allegations of fact contained in the petition were admitted. The case was heard on demurrers to the answer, not on demurrers to the petition. Many of the important facts were admitted, but some allegations were denied and many conclusions were challenged.

We do not think that the statement of the Court of Appeals' decision on page 8 is complete, but we need not elaborate here.

As petitioners state, the Commission, pending this case, issued reports covering the compensation to be paid by the M-K-T. It also issued a final order (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* 198 I. C. C. 4, 7, 32). We shall discuss these in our argument.

ARGUMENT.

I.

The Court of Appeals Correctly Decided That Mandamus Would Not Lie in Any Event.

The Court of Appeals held (1) that the Commission, having determined, after a hearing and after construction by it of statutes, which, viewed in the light most favorable to petitioners, were not free from doubt, that it could not grant the relief prayed, was not subject to control by mandamus (R. p. 256, 71 F. (2d) 341), and (2) that the Commission's construction was probably correct as a matter of law (R. p. 254, 71 F. (2d) 340).

It is the first of these holdings which we desire to discuss here.

It has been settled by this Court that, where an administrative body (especially one like the Interstate Commerce Commission, exercising quasi-judicial functions) is called upon to construe a statute, the construction of which is not free from doubt, whether such construction relates to the extent of its powers or only to their application, it is not subject to control by mandamus with reference to the action involved in such construction.

> "Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may

be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes, the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus" (*Wilbur* v. *United States,* 281 U. S. 206, l. c. 218).

"In making those decisions the Commission would necessarily act in a *quasi* judicial capacity. If it misconstrued the term 'deficit,' it committed an error: but it did not transcend its jurisdiction" (*Butte, etc., Ry. Co.* v. *United States,* 54 Sup. Ct. Rep. 108, 110).

It is otherwise where the construction of the statute has been settled by repeated decisions of this Court (*Interstate Commerce Commission* v. *Humboldt Steamship Company,* 224 U. S. 474; *United States ex rel.* v. *Interstate Commerce Commission,* 246 U. S. 638), or where the bone of contention is not the construction of the statute, but the practicability of complying with it (*United States ex rel.* v. *Interstate Commerce Commission,* 252 U. S. 178).

This Court's decision in *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. R. Co.,* 287 U. S. 178, illustrates the distinction. In the Kansas City Southern case the statutory mandate was so clear as not to admit of controversy. In the New Haven case the "duty is not plainly prescribed, but is to be gathered from statutes of uncertain meaning" (l. c. 203), and accordingly mandamus was refused. Compare also *Ex parte Harding,* 219 U. S. 363, and *General*

Investment Company v. *New York Central R. R. Co.*, 271 U. S. 228.

Here the Commission heard all the evidence offered by petitioners, gave it careful consideration (R. p. 111), accorded them a full hearing, including briefs and argument, construed the statutes relied upon (which obviously contain no unequivocal mandate) and decided that the Commission could not, under the statutes, grant the relief prayed. We expect to show that the Commission's construction of the statutes was correct. The Court of Appeals evidently so thought (R. pp. 254, 255, 71 R. (2d) 340). Certainly no decision of this Court has determined otherwise, and clearly the construction of the statutes (on the assumption that there is any ground at all for petitioners' claimed construction) is not free from doubt. Plainly, therefore, the Commission's action cannot be controlled by mandamus.

But, petitioners say, there is a difference between the construction of statutes affecting the Commission's power to act and the construction of statutes encountered in the current application of its powers.

This distinction is wholly illusory.

In the first place, the decisions do not support such a distinction.

In the second place, petitioners confuse jurisdiction and power. The Commission here did not deny that it had jurisdiction to correct discriminations by virtue of Paragraphs (1) and (3) of Section 3, and to requisition the use of the terminals of one carrier for another by virtue of Paragraph (4) of Section 3. On the

contrary, it assumed both jurisdictions, but correctly decided that it had the power to and must determine what kind of discriminations the Commission was directed or permitted to correct by the terms of Paragraphs (1) and (3) and for what carriers Paragraph (4) provided relief. It then proceeded to determine both questions.

In the third place, where a statute is construed by an administrative body, such as the Commission, a determination of its own power is almost necessarily wrapped up in the construction of the statute. When the Commission construed the word "deficit" in the Transportation Act of 1920, it necessarily determined the extent of its own power in dealing with the particular carrier (*Butte, etc., Ry. Co.* v. *United States,* 54 Sup. Ct. Rep. 108). When Secretary Wilbur decided that the Indian annuities provided by Congress depended on tribal relationships, he necessarily determined the extent of his own power in dealing with the particular Indians (*Wilbur* v. *United States,* 281 U. S. 206).

So far as Paragraph (4) is concerned, the Commission's decision was based, not on a lack of power over appropriation proceedings, but on the petitioners not being within the class for which the statutes provide relief. When the District Court, in *General Investment Company* v. *New York Central R. R.,* 271 U. S. 228, dismissed the plaintiff's suit on the ground that plaintiff was not one of the class of persons for whom the Sherman Act and the Clayton Act provide relief, its decision was a decision on the merits (as this Court ex-

pressly held). As such, it is on all fours with the Commission's decision here that petitioners are not of the class of railroad companies for which Paragraph (4) of Section 3 provides relief.

Furthermore, the Commission did not stop with construing its own powers. It expressly held that, on the assumption that the Commission did have full power, the petitioners were not entitled to relief on the facts (R. p. 116). The Commission said:

> "Assuming, without now deciding, that the provisions of Paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of Paragraph (3)."

The Commission thus (a) assumed jurisdiction under both Paragraphs (1) and (3) and Paragraph (4); (b)

decided that it lacked power under Paragraphs (1), (3) and (4) to set aside respondents' contract; (c) decided that petitioners were not of the class for which relief was provided by Paragraph (4); (d) decided that, even if the Commission had full power to set aside the contract, no discrimination of the kind contemplated by Paragraphs (1) and (3) was shown by the evidence; and (e) for these reasons, *i. e. on the merits,* dismissed the intervening petitions of these petitioners. The Commission's answer in substance so alleged (R. p. 205).

Plainly mandamus does not lie to compel the Commission to decide otherwise.

II.

The Commission's Construction of the Statute Was Right As a Matter of Law, and the Court of Appeals Evidently So Thought.

The Court of Appeals, though it cautiously refrained from making this the basis of its decision, clearly agreed with the Commission's construction of the statute (R. pp. 254, 255, 71 F. (2d) 340).

In considering the power of the Commission to grant the relief asked by the petitioners in their intervening petitions, there are certain fundamentals which must be borne in mind:

(1) The Interstate Commerce Commission is an administrative agency of the government (*United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 282 U. S. 311, 324; *Interstate Commerce Commission* v. *Humboldt Steamship Company*, 224 U. S. 474, 484; *W. A.*

Hover & Co. v. *Denver, etc., R. R. Co.*, 17 F. (2d) 881, 884 (C. C. A. 8)). It can exercise only such powers as are given by statute, either expressly or by clear implication (*Chesapeake & Potomac Telephone Company* v. *Manning*, 186 U. S. 238, 248; *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52, 67, 68, 69, 70, 71; *Interstate Commerce Commission* v. *Oregon-Washington River Navigation Company*, 288 U. S. 14, 35).

(2) The petitioners, by their interventions in the M-K-T case, have asked this administrative agency of the government to set aside a contract, by which twelve railroad corporations undertook to settle their proprietary rights in the Terminal Company's property and in its use for two hundred years, and on the faith and security of which the bonds of the Terminal Company were issued and sold to the public (see especially Section 2 of Article I, Section 1 of Article II, and all of Article V of the Operating Agreement (R. pp. 21, 25, 49)). They are not asking the Commission to regulate any activity of the Terminal Company as a common carrier, but they are asking that this contract, upon which its very existence depends, without which its first mortgage bonds would be of little value, and by which the property rights of the various companies in its facilities are established, shall be utterly destroyed.

(3) The destruction of these property and contract rights, if not plainly in violation of the Fifth Amendment, certainly raises grave constitutional questions.

(4) The authority to destroy these property and contract rights must be found in the language of the Interstate Commerce Act, or some other Act of Congress. The power must be conferred in express language or by necessary implication. Vague generalities are not sufficient. It cannot be presumed that Congress intended to defy the Constitution. Only the plainest language, expressing the intent of Congress, should be construed to delegate such an authority to the Commission (*United States* v. *Delaware & Hudson Company*, 213 U. S. 366, 407; *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217; *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 337; *Lewellyn* v. *Frick*, 268 U. S. 238, 251).

It, therefore, behooves us to examine the provisions of the Interstate Commerce Act, which are supposed to grant this extraordinary power.

In petitioners' brief they claim that their interventions were justified by Paragraphs (1), (3) and (4) of Section 3 (49 U. S. C. A., Secs. 3(1), 3(3), 3(4)). While petitioners, at pages 19 and 24 of their brief, quote the language of these paragraphs, in their argument they disregard the language. They prefer to deal in vague generalities regarding preferences and discriminations. The exact language of these paragraphs is essential to clear thinking.

PARAGRAPHS (1) AND (3) OF SECTION 3.

Paragraph (1) of Section 3 is as follows:

"(1) That it shall be unlawful for any *common carrier* subject to the provisions of this Act to make

or give any undue or unreasonable *preference* or advantage *to any particular person,* company, firm, corporation, or locality, or any particular description of *traffic,* in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" (italics ours).

Paragraph (3) of Section 3 is as follows:

"(3) All *carriers,* engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and *equal facilities for the interchange of traffic* between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and *shall not discriminate in their rates, fares and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper*" (italics ours).

When read together, the intent of these provisions is plain.

Paragraph (1) obviously applies only to shippers. Paragraph (3) applies only to other carriers. Paragraph (1) has no application to other carriers. Paragraph (3) has no application to shippers. Both paragraphs have been in the Act since its passage in 1887 in their present form, except that the Transportation Act of 1920 eliminated the last clause of Paragraph (3) as originally written (whose presence might have seemed inconsistent with the new Paragraph (4)), and substituted language prohibiting discrimination in the distribution of traffic

not specifically routed by the shipper. It is axiomatic that these anti-discrimination provisions apply only to those railroad functions which, under the common law or the positive mandates of the Interstate Commerce Act, are imposed upon the railroad company *as a common carrier.* They have no application to a railroad company's exercise of its ordinary *proprietary rights.* This is made plain by the case of *Donovan* v. *Pennsylvania Company,* 199 U. S. 292, where it was held that a railroad company could make an exclusive contract with a bus and transfer company, and that it need not extend similar facilities to hack drivers generally because it owed no duty, either at common law or by statute, to such hack drivers. The doctrine of this case is firmly established by the decisions of this Court in *Delaware, Lackawanna & Western R. R. Co.* v. *Town of Morristown,* 276 U. S. 182, and *Black and White Taxicab Company* v. *Brown and Yellow Taxicab Company,* 276 U. S. 518.

See, also, *Express Cases,* 117 U. S. 1 (exclusive contract with express company); *Railroad Company* v. *Pullman Company,* 139 U. S. 79 (contract with sleeping car company); *Santa Fe, Prescott & Phoenix Railway Co.* v. *Grant Brothers Construction Co.,* 228 U. S. 177 (transportation of contractor's outfit); *Clough* v. *Grand Trunk Western Ry. Co.,* 155 Fed. 81 (transportation of circus); *Sager* v. *Northern Pacific R. R. Co.,* 166 Fed. 526 (transportation of circus); *Matter of Railroad-Telegraph Contracts,* 12 I. C. C. Rep. 10, 11 (contract with telegraph company).

In like manner, a railroad company owes no duty to buy railroad equipment from all the manufacturers of railroad equipment, because it has bought from one. It owes no duty to pay Smith a certain price for the coal bought from him because it has already paid that same price to Jones. It owes no duty to sell Brown a worn-out locomotive because it has sold White a worn-out locomotive. The proposition is so obvious that further illustrations would be superfluous.

Counsel rely upon expressions in opinions of this Court to the effect that railroads as well as shippers are entitled to impartial treatment. Such language, of course, must be read in its context. In no case has the Court held that one railroad company owes a duty of impartiality to other railroad companies in its proprietary relationships with them, any more than it has held that a railroad company owes a duty of impartiality to merchants in its proprietary relationships with *them*.

In *Pennsylvania Company* v. *United States*, 236 U. S. 351, cited by petitioners, the discrimination was with respect to the specific duties imposed upon the carrier by Paragraph (3) of Section 3.

In *Louisville & Nashville Railroad Company* v. *United States*, 238 U. S. 1, the discrimination was with respect to "a particular description of traffic," which falls expressly within the inhibition of Paragraph (1) of Section 3.

In the *Chicago Junction Case*, 264 U. S. 258, the language of the Court was used merely to show that a carrier had a sufficient interest to entitle it to a review of an order of the Commission. The order was set aside, not on the ground of discrimination, but on the ground that the bill showed that there was no evidence to support the order.

Chicago, I. & L. Railway Co. v. *United States*, 270 U. S. 287, is a typical case of discrimination under Paragraph (3) of Section 3. The Lake Erie refused to establish through routes or joint rates for interchange switching charges with an electric railroad. We quote from this Court's discussion of the effect of the Interstate Commerce Commission's order:

> "* * * The order directed the steam railroads to remove the unjust discrimination which the Commission found was being practiced against an electric railroad, which also entered that city, by refusal to switch its interstate carload traffic and to make arrangements with it for reciprocal switching" (l. c. 290).

In *Colorado* v. *United States*, 271 U. S. 153, the specific power applied was that contained in Paragraphs (19) to (21) of Section 1, the power to authorize the abandonment of facilities.

Transit Commission v. *United States*, 289 U. S. 121, did not involve Section 3 at all. It arose under Paragraph (18) of Section 1. The Commission did not exercise jurisdiction to prevent any alleged discrimination. No discrimination was even claimed. It exercised juris-

diction under the express authority of Paragraph (18) of Section 1, which precludes a carrier from extending its line without first securing the authority of the Commission. The Commission held that the extension of a line, by making a trackage contract instead of acquiring title, came within the Act. The Commission, therefore, was interested in the terms upon which the carrier would acquire such trackage rights just as it would be interested in the price which the carrier might pay to acquire title to a proposed extension.

Cincinnati, etc., Railway Company v. *Indianapolis Union Railway Company*, 36 F. (2d) 323, likewise has nothing at all to do with Section 3. The court exercised a long-settled equity jurisdiction with reference to the adoption or rejection of contracts by purchasing companies. No question of discrimination was involved.

Railroad Commission v. *Southern Pacific Company*, 264 U. S. 331, likewise did not involve Section 3. It arose under Paragraphs (18) to (21) of Section 1, relating to the extension and abandonment of facilities. The Court merely held that the railroad companies could not be required to provide a new union station and extend their main tracks thereto, unless and until the Interstate Commerce Commission should act under the paragraphs referred to and thus authorize the extension.

In *Alabama & Vicksburg Railway Co.* v. *Jackson & Eastern Railway Co.*, 271 U. S. 244, the specific power sustained and applied was that given by Paragraphs (18) to (21) of Section 1.

In the *Dayton-Goose Creek Case*, 263 U. S. 456, the Court says that the Transportation Act "puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission," but this language obviously refers to the extent to which Congress has enlarged the powers of the Commission *by the Act*. It does not mean that the Commission has unlimited powers, or, in fact, any powers other than those given in the Interstate Commerce Act, as amended by the Transportation Act. These powers are broad enough to justify the phrase used by the Court, without twisting that phrase into a grant of still further powers.

The language of Paragraph (4) demonstrates that the general language of Paragraphs (1) and (3) is not to be given any such strained interpretation as appellants seek to give it, for Congress in Paragraph (4) has specifically recognized that equality in compensation and terms for the use of facilities is not necessary, but that the carrier owning the facilities may agree on the terms with the other carrier or carriers involved. In fact the Commission's jurisdiction to fix the compensation is made expressly contingent on the carriers not being able to agree. If they do agree, the Commission has no power to proceed further, no matter what variance there may be between the compensation paid by the different carriers.

The conclusion is unavoidable that the sole authority for one carrier's acquiring the use of the facilities of another is to be found in Paragraph (4) of Section 3.

In *Davis* v. *Pringle*, 268 U. S. 315, the Court held that a provision of the Bankruptcy Act, which in one clause

specifically described the priorities to which the United States was entitled, was not to be construed to give additional priorities to the United States by reason of general language at the end of the provision, the Court saying:

> "We attach little value to this logical concatenation as against the direct effect of Section 64, taken according to the normal usages of speech. It is incredible that after the conspicuous mention of the United States in the first place at the beginning of the section and the grant of a limited priority, Congress should have intended to smuggle in a general preference by muffled words at the end" (l. c. 318).

So, here, it is incredible that, in view of the specific provision made in Paragraph (4) for the acquisition of rights by one carrier in the facilities of another, and for the machinery to make such acquisition effective, Congress should have intended to smuggle in a general and undefined right to use such facilities by "muffled words" in accompanying paragraphs of the same section—and that, not by definitely inserting such muffled words, but merely by leaving untouched words which were already in the Act and had been there since 1887.

If Paragraph (4) opened the terminals of all carriers to all other carriers at the pleasure of the latter, there might be some excuse for contending that the anti-discrimination provisions of Paragraphs (1) and (3) applied. But Congress has done no such thing. Paragraph (4) recognizes that no carrier holds itself out as a furnisher of terminal facilities to all the world, but that its facilities are private property which can be taken by its competitors only upon payment of just compensation. It there-

fore requires, not the payment of rates for a common carrier service, but the payment of just compensation for property taken. And before the owner can be disturbed in any way, it provides that the Commission must find its disturbance to be in the public interest; and, before the Commission can fix the compensation, it provides that the owner and the proposed user must have failed to agree. In other words, Paragraph (4), instead of prohibiting discrimination, affirmatively contemplates differences in treatment. The public interest might call for the use by one carrier but not by another—a difference. The Commission might require the use by two carriers, and the owner might agree as to the compensation with one and not with the other. The Commission then, following the mandate of the statute, might fix the compensation to be paid by the other carrier at a less or a greater sum than that agreed to between the owner and the first carrier—again, a difference.

The fact is that Paragraph (4) fixes in plain language the conditions under which the Commission can take jurisdiction and the methods to be followed in fixing the compensation, if jurisdiction is assumed. These provisions are exclusive, and Paragraphs (1) and (3) have no bearing on them whatever.

It is plain that no authority for the annihilation of the Operating Agreement and of the security for this company's bonds is to be found in Paragraphs (1) and (3) of Section 3.

PARAGRAPH (4) OF SECTION 8.

At page 24 of their brief petitioners also mention Paragraph (4). The pertinent part of Paragraph (4) is as follows:

> "(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of *a carrier owning or entitled to the enjoyment of terminal facilities* to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, *by another carrier* or other carriers, on such terms and for such compensation *as the carriers affected may agree upon*, or, *in the event of a failure to agree, as the Commission may fix as just and reasonable* for the use so required, to be ascertained *on the principle controlling compensation in condemnation proceedings.* Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced" (italics ours).

Paragraph (4) was added to the Interstate Commerce Act by the Transportation Act of 1920 (41 Stat. L. 479). The purpose of Congress, as declared in latter Act (see 41 Stat. L. 488), was to enable the railroads as a whole to furnish adequate transportation service to the public, not to serve the interests of individual carriers, nor to provide for arbitration of disputes growing out of contractual relationships between carriers. (See *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 585, 589; *New England Divisions Cases,* 261 U. S. 184, 189; *Dayton-Goose Creek Railway Company* v. *United States,* 263 U. S. 456, 478.)

Paragraph (4) requires no interpretation. By its terms, it has no application unless the parties themselves have been unable to agree.

The right to invoke its provisions is extended only to carriers *other* than the carrier owning or entitled to the enjoyment of terminal facilities. A carrier already entitled to the enjoyment of the terminal facilities is thus by direct implication excluded from the category of carriers for whom the enjoyment of the use may be commandeered.

And, even where the use is condemned for the benefit of a carrier not already entitled to its enjoyment, the jurisdiction of the Commission *to fix the compensation* is, by the express language of the statute, wholly excluded where the carriers agree between themselves. The Commission in such case may require the use, but only "on such terms and for such compensation as the carriers affected may agree upon, *or, in the event of a failure to agree,* as the Commission may fix, etc." The failure to agree is thus an express condition precedent to the exercise by the Commission of the power to fix the compensation.

The power of the Commission to determine the terms and compensation for the use, therefore, is confined to those cases where one of the carriers is not entitled to the use and where the carriers have not been able to agree between themselves, either by prior contract or by agreement after the use has been ordered.

The language of Paragraph (4) is not confined to those cases where a condemnation petition is filed by a carrier. The Commission has the power of initiative.

It can itself order the use, and then proceed, in the exercise of the power of eminent domain, to fix the compensation if the parties do not agree. The Commission may remove discriminations without application therefor. If Congress had intended to authorize the Commission to fix the compensation for carriers already bound by contract to a different compensation, Congress would not have limited the power of the Commission in the fixing of compensation to those cases where the parties fail to agree, because the parties, if satisfied between themselves with their contract, could completely checkmate any action initiated by the Commission. All they would have to do, after the Commission had ordered the use, would be to agree again upon the compensation to which they had already agreed in the contract.

If Congress had intended to give the Commission the power to set aside contracts already made, and to fix the compensation, regardless of such contracts, it would have made such intention clear, and it would not have left it to be extracted by a process of refined reasoning from provisions which are appropriate for ordinary proceedings in eminent domain as between parties who are unable to agree, and are wholly inappropriate to the fixing of compensation by the Commission in disregard of the agreements of the parties.

To paraphrase the language of Mr. Justice Holmes in *Davis* v. *Pringle*, 268 U. S. 315, 318: It is incredible that, after the use of language appropriate to parties not under contract with each other, Congress should have intended to smuggle in a provision to destroy solemn contracts of a proprietary nature by muffled words.

Congress, in the Transportation Act, met a practical situation in a practical way. It knew that many of the railroads of the country had extensive terminals which other companies could not use, and which the public interest might require to be shared. It also knew that there were many other terminals, including all of those owned by the so-called terminal companies, which were already used by a number of carriers under long-time contracts, upon the credit of which bonds had been issued and sold to the public. Congress recognized that the public interest might require that the first class of terminals be opened up to other carriers. The second class were already opened up to other carriers to the extent of the contracts already in effect, and could be opened up still further to accommodate other carriers not having the benefit of such contracts. The language used is appropriate to this end. It is not appropriate to any other.

It shows that the *intention of Congress* was to give the Commission power, when it found it in the public interest, to require the joint use of terminals, where no previous arrangement for such use existed and the parties themselves were unable to agree. Congress just as plainly did not intend to authorize the Commission to step in where contracts were already in effect providing for the joint use of terminal facilities and the carriers interested were actually making joint use of such facilities—merely because one or more of the carriers might think that the contract which it had made was, perhaps, not as favorable to it as some other contract might have been. Congress intended that the Commission should be

in a position *to secure for the public the requisite service.* It did not intend to make the Commission a court of equity to reform existing contracts nor a court of law to settle disputes between the carriers growing out of such contracts.

Let us look at the petitioners.

Each of them is already entitled to the use of the facilities by virtue of a contract effective for a period of two hundred years (R. pp. 18, 63, 64). By virtue of the Operating Agreement, the franchise ordinance which is referred to in the Commission's report (R. p. 99), the equitable ownership of the stock of the Terminal Company and the unity of ownership and control effected by the Stock Trust Agreement (R. pp. 137, 162), each of them is also in practical effect the owner of an undivided interest in the entire property of the Terminal Company. In view of the elaborate character of the organization and machinery for control, the Terminal Company somewhat resembles a corporate trustee, holding legal title to the property, with the equitable title in the proprietary companies (Cf. *Chicago, Milwaukee & St. Paul Railroad Company* v. *Des Moines, etc., Railway Company*, 254 U. S. 196).

It is plain that neither of the petitioners (themselves proprietary companies) can be classed as "another carrier," to which Paragraph (4) of Section 3 gives the Commission power to extend the use of terminal facilities. It follows that the Commission has no power to fix the compensation to be paid by them. Its power in fixing compensation is limited to those cases where it requires

the use. Where the parties already have the right of use, the statute is silent as to any right to fix compensation. The appellants, therefore, do not come within the class of carriers for which the Commission has the power to fix the compensation to be paid.

If Congress had intended to give the Commission any such power, it would have been perfectly simple to use appropriate language for that purpose. It would have been provided expressly, first, that the Commission should have the power to require the joint use of terminal facilities by any carrier whether previously entitled thereto or not, and also the power "to revise, readjust or ignore all existing contracts between carriers relating to terminal facilities, and to prescribe the terms and conditions upon which such carriers shall make joint use of the facilities owned by either or all of such railroads, or to the enjoyment of which either or all of such railroads by contract may be entitled, including the payments to be made and the services to be performed by either or all." Congress would not have left such extraordinary powers to be inferred from general language. If Congress had intended to destroy solemn contracts, without compensation, it would have made that intention plain.

(The cases cited on page 22 of petitioners' brief have no application. While, in some instances, contracts which undertake to control for all the future a matter which falls within the regulatory police power of Congress will not stand in the way of the exercise of Congress' paramount powers, the rule is not applicable to contracts unrelated to the carrier's

duties as a common carrier. Even where they are related to the carrier's duties as a common carrier, they will not be ignored unless they clearly entrench upon an express provision of an act of Congress or upon a power clearly given by an act of Congress. The cases cited by petitioners are all of this character. The contracts involved undertook to control the action of the carriers in respect to their duties as common carriers and in respect to matters regarding which Congress not only had the power to legislate, but had actually legislated, and had conferred express powers upon the Interstate Commerce Commission.)

In *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52, the Court held that the Interstate Commerce Commission had no power to require the construction of a union station by railroad companies. After various attempts to bring about the construction of a union station, the City of Los Angeles brought a proceeding before the Interstate Commerce Commission, asking that the railroads be ordered by the Commission to construct and use such a station. The Commission held that it was not empowered by Congress to make such a requirement. This Court denied mandamus. The Court construed various general provisions of the Act, which it was claimed conferred the power, and held that a power of this character, affecting as it would the important property interests of the railroads, must rest upon express language, and that it could not be fabricated out of general expressions. This Court says:

"In weighing the effect of the Transportation Act, it should be noted that in this important measure affecting associations between interstate carriers of a compulsory character, *there is nowhere express authority for the establishment of union passenger stations, compulsory or otherwise*" (l. c. 67).

• • • • • • •

"The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, *that power we should expect to find in congressional legislation*" (l. c. 67, 68) (italics ours).

• • • • • • •

Interstate Commerce Commission v. *Oregon-Washington River Navigation Company*, 288 U. S. 14, involved an order of the Interstate Commerce Commission, which required the Oregon-Washington River Navigation Company "to extend its line of railroad now terminating near Burns, Oregon, from or near a station thereon designated as Crane, Oregon, to a connection with the Cascade Line of the Southern Pacific Company at or near Crescent Lake, Oregon" (l. c. 22). The Court held that the order exceeded the Commission's powers and should, therefore, be set aside. The Commission had based its order upon Paragraph (21) of Section 1 of the Transportation Act (49 U. S. C. A., Sec. 1 (21)), which, along with Paragraphs (18) to (20) of Section 1, forbidding extensions, construction of new roads or abandonments without the order of the Com-

mission, was added by the Transportation Act of 1920 (41 Stat. L. 456, 476). By Paragraph (21), the Commission was given power to require any carrier "to provide itself with safe and adequate facilities for performing as a common carrier its car service, as that term is used in this chapter, and to extend its line or lines." The Court held that the phrase, "and to extend its line or lines," must be construed in its context, that the extensions mentioned had to do with car service, and that the clause was not intended to create a wholly independent subject of jurisdiction. This Court says:

> "• • • In the proviso the furnishing of facilities and extension of lines are blended as belonging in a single class. We should expect, *if Congress were intending to grant to the Commission a new and drastic power* to compel the investment of enormous sums for the development or service of a region which the carrier had never theretofore entered or intended to serve, *the intention would be expressed in more than a clause in a sentence dealing with car service*" (l. c. 35) (italics ours).

In *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, it was held that Paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act did not authorize the Interstate Commerce Commission to control the abandonment of an intrastate railroad, whose situation and ownership were such that interstate and foreign commerce could not be burdened or affected by a discontinuance of its business. This Court says, with reference to the paragraphs of the Act relied on:

"As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. * * * And *had there been a purpose here to depart from the accustomed path* and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, *it is but reasonable to believe that that purpose would have been very plainly declared.* This was not done" (l. c. 217, 218) (italics ours).

Furthermore, it is apparent from reading the appellants' intervening petitions that they are not really seeking a remedy under Paragraph (4) of Section 3. They do not want an order requiring their use of the facilities and the ascertainment of compensation "on the principle controlling compensation in condemation proceedings." They want something very different. They want a revision of the Operating Agreement and a readjustment and reapportionment of the fixed charges among the various proprietary companies. They ask for an order which will place the use and terms of use "on a fair, just and equitable basis among such parties in accordance with and in proportion to the use made thereof by the various parties" (intervening petition of the Kansas City Southern, R. p. 93).

ACT SHOULD NOT BE SO CONSTRUED AS TO RAISE GRAVE CONSTITUTIONAL QUESTIONS.

Even if there were ambiguity in the language, there would be no difficulty in reaching its proper interpretation. To interpret it as petitioners advocate would at once raise grave constitutional questions.

We expect to show later that they would be insuperable. It is enough here that they are serious. It is a thoroughly settled principle of statutory construction that an interpretation which would render a statute unconstitutional or of doubtful constitutionality will never be adopted if any other interpretation is permissible (*United States* v. *Delaware & Hudson Company*, 213 U. S. 366, 407; *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217).

> "Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind" (*Lewellyn* v. *Frick*, 268 U. S. 238, 251).
>
> "We do not discuss the question whether it (Congress) could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent" (*Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 337).

If Congress had intended to confer upon the Commission the right to destroy contract relationships between railroad companies, upon which their rights of property are established, and upon the faith of which money for the construction of facilities has been borrowed from trusting investors, Congress would have so provided. It would not have left any such extraordinary power to be inferred from language authorizing the condemnation of trackage rights generally, nor from general language directed against discrimination by carriers.

PETITIONERS' CONSTRUCTION RENDERS ACT IN VIOLATION OF FIFTH AMENDMENT.

The construction put upon the Act by petitioners makes the Act unconstitutional. It plainly amounts to a deprivation of the property of this respondent, of the other proprietary companies, and of the holders of the bonds sold by the Terminal Company.

> "* * * *The powers possessed by the Commission are delegated by Congress under, and are to be exercised in conformity with,* the constitutional grant of authority to regulate interstate and foreign commerce" (*United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 282 U. S. 311, l. c. 324) (italics ours).
>
> "* * * We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196; *Lottery Case,* 188 U. S. 321, 353" (*Adair* v. *United States,* 208 U. S. 161, l. c. 180).

OPERATING AGREEMENT IS PROPERTY.

(a) The Operating Agreement is a contract which establishes valuable proprietary rights as between the parties to it, and unquestionably is property (*Adkins* v. *Children's Hospital,* 261 U. S. 525, 545; *Coppage* v. *Kansas,* 236 U. S. 1; *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Missouri-Kansas-Texas R. R. Co.* v. *Oklahoma,* 271 U. S. 303; *United States* v. *Chicago, etc., Railroad Company,* 282 U. S. 311, 327; *Green* v. *Edwards,* 31 R. I. 1, 77 Atl. 188; *People* v. *Kempner,* 139 N. Y. S. 440 (affirmed 208 N. Y. 16, 101 N. E. 794); *Western Massachusetts Co.* v. *Hilton,* 58 N. Y. S. 996).

Of course, it is possible that Congress might authorize the taking of contract rights as well as physical property for public use, but, in such event, the Fifth Amendment would require that just compensation should be ascertained and paid for the destruction of the contract rights (see *Offield* v. *New York, etc., Co.*, 203 U. S. 372; *Monongahela Navigation Company* v. *United States*, 148 U. S. 312; *Adair* v. *United States*, 208 U. S. 161; *United States* v. *Chicago, etc., Railroad Company*, 282 U. S. 311).

The parties to the Operating Agreement would, therefore, be entitled to compensation for the acquisition or destruction of their property rights.

The Act, however, contains no provision for condemning contract rights nor providing compensation therefor, and appellants, by their interpretation of the Act, deny that the Act contemplates their condemnation or the payment of compensation for them.

BONDHOLDERS ENTITLED TO DUE PROCESS OF LAW.

(b) The trustee in the Terminal Company's First Mortgage is a party to the Operating Agreement, and the Operating Agreement has been assigned to and pledged with the trustee by all of the parties to the Operating Agreement as security for the first mortgage bonds of the Terminal Company (R. pp. 18, 49, 53). The contract rights of the bondholders are vested rights, and the cases above cited under the preceding point apply equally here.

In addition, neither the trustee in the mortgage nor the bondholders were parties to the proceeding before

the Interstate Commerce Commission and could not be made parties since the Interstate Commerce Act gives the Commission jurisdiction only over carriers. It does not give the Commission jurisdiction over the private rights of individuals, banks and other corporations.

The first principle of due process of law is notice and an opportunity to be heard (*Davidson* v. *New Orleans*, 96 U. S. 107; *Hagar* v. *Reclamation District*, 111 U. S. 708; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413).

In *Coe* v. *Armour Fertilizer Works, supra*, the Court says, with reference to the Fourteenth Amendment:

> "which requires at least a hearing or an opportunity to be heard in order to warrant the taking of one's property (l. c. 423).
>
> • • • • • • •
>
> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires (l. c. 424).
>
> • • • • • • •
>
> " 'This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace' " (l. c. 425).

Due process of law in the Fifth Amendment has the same meaning as in the Fourteenth Amendment (*Twining* v. *New Jersey*, 211 U. S. 78, 101).

Even if the trustee and the bondholders had had notice, their interest in the mortgage is property, which is protected by the due process clause and cannot be taken without just compensation. "It is fundamental

that a mortgage or trust deed securing an indebtedness is 'property' within the meaning of the Constitution of the United States" (*Illinois Trust & Savings Bank* v. *City of Des Moines,* 224 Fed. 620, 621).

See, also, *Bradley* v. *Lightcap,* 195 U. S. 1.

Petitioners' argument (page 22 of their Brief) that it makes no difference to the bondholders whether the Operating Agreement is maintained or not, is palpably fallacious. The bondholders are entitled to the full benefit of the covenant of *every party* to the Operating Agreement that it will pay the principal and interest of the bonds, even if every other party should be insolvent or out of existence (see Article II, Section 1 of the Operating Agreement, especially Paragraphs (a), (b) and (f) (R. pp. 25, 26)). They are entitled to hold the Kansas City Southern and the Chicago Great Western, which are solvent companies, for the full amount of their proportionate part of principal and interest (R. p. 26), and their proportionate part, or the whole, of any amount which may be payable on account of the default of any other company (R. p. 26). They cannot be relegated to a claim upon whatever amount the Terminal Company may happen to collect from the M-K-T or some company in the hands of receivers. They are entitled to the full benefit of the covenants of the parties which made them.

III.

Obiter Dicta in the Court of Appeals' Opinion.

At page 23 of their brief, counsel for petitioners base an argument as to the alleged unfairness of the

Operating Agreement on some remarks in the Court of Appeals' opinion. The fairness or unfairness of the Operating Agreement is not an issue on this petition for a writ of *certiorari,* but we cannot let the argument pass without notice.

The Court of Appeals' remarks are purely *obiter dicta.* They are based upon the somewhat vague charges and conclusions set out in petitioners' application for mandamus. Although they were not properly in the case, it was perhaps not unnatural that the Court of Appeals should take petitioners' statements at their face value, as the Court did not have before it respondents' side of the matter (the correctness or incorrectness of the charges being immaterial in mandamus).

The applicability of Exhibit 2 to petitioners' application (upon which the Court's remarks are based) was challenged in this respondent's answer (R. p. 232). It attempts to average use in all zones without a common denominator applicable to all zones (some zones being on a car mileage basis, others on a straight car basis and others on such bases as tons of freight, number of hours, etc.). Furthermore, it does not show the *aggregate* amounts paid by the various companies for 1932.

The Court of Appeals' intimation that the Commission "would have revised the contract accordingly if they could have interpreted the statutes broadly enough to justify such action" is refuted by what the Commission actually did.

The Commission, after dismissal of petitioners' interventions, held extensive hearings on the M-K-T's original application and handed down a report and order fixing the compensation to be paid by the M-K-T (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company*, 198 I. C. C. 4). In this report it repudiates the so-called user basis for apportioning interest and taxes and holds that the unit or numerical basis is the fair basis. The Commission says:

> "Petitioner contends that the numerical basis is grossly inequitable, and that there is nothing in the language of the statute or the decisions of this Commission or the courts which prevents measuring the compensation by the extent of the use. *When analyzed, its position amounts to this, that respondent must hold its property in readiness at all times for the joint and equal use of petitioner, but that petitioner should be permitted to use the various zones if and when it may choose to do so, or not at all if it should so choose as to any particular zone, and to pay only for such use as it may actually make of the property*" (italics ours) (l. c. 9).
>
> "*The user basis* as a method for determining the portion of the interest charge to be imposed upon petitioner finds no support in the principles governing compensation in condemnation cases, and *in our opinion does not afford a just and reasonable basis.* We conclude that the numerical basis in the circumstances of this case affords the just and reasonable method to be applied" (italics ours) (l. c. 11).

IV.

Conclusion.

The action of the Commission was clearly not subject to mandamus. The Court of Appeals correctly so decided and the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 234

THE UNITED STATES OF AMERICA EX REL. CHICAGO Great Western Railroad Company and the Kansas City Southern Railway Company, petitioners

v.

INTERSTATE COMMERCE COMMISSION, ET AL., respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

INTRODUCTORY STATEMENT

Petitioners herein seek to have this Court review a decision of the United States Court of Appeals for the District of Columbia, dated May 7, 1934 (71 Fed. (2d) 336) (R. 245), affirming a judgment of the Supreme Court of the District (R. 239) dismissing the petition of Chicago Great Western Railroad Company and The Kansas City Southern Railway Company for a writ of mandamus to com-

pel the Interstate Commerce Commission to vacate its order dismissing, and to forthwith consider and pass upon the merits of, petitions filed by said carriers, whereby they sought to be relieved of certain obligations voluntarily assumed in relation to the maintenance and use of the Kansas City Terminal at Kansas City, Missouri, and Kansas City, Kansas.

OPINIONS BELOW

No opinion was rendered by the Supreme Court of the District. The decision of the Court of Appeals appears at R. 245–257, and is reported in 71 F. (2d) 366 et seq. The report of the Interstate Commerce Commission appears at R. 94–134, and is reported in 104 I.C.C. 203.

JURISDICTION

The judgment of the Supreme Court of the District was entered June 23, 1933 (R. 239); petitioners noted an appeal in open court on the same day (R. 239); on May 7, 1934, the Court of Appeals (R. 245) affirmed the action of the lower court, and within 90 days, (on July 28, 1934) petition for writ of certiorari was filed in this Court.

QUESTIONS PRESENTED

1. Whether the Commission's action dismissing the petitioners' intervening petitions was a decision on the merits or a denial of its jurisdiction.

2. Whether the court may review a determination of the Commission made in the exercise of

judgment and discretion in a matter committed to the latter and substitute the court's judgment for that tribunal's.

3. Whether the Commission's decision and order were reasonable and not arbitrary.

STATUTES INVOLVED

The pertinent provisions of the applicable law, the Interstate Commerce Act, U.S. Code, Title 49, c. 1, are set forth in the appendix, *infra,* pages 51 to 55.

STATEMENT OF THE CASE

Proceedings before the Commission

The proceeding before the Commission, known as Docket No. 15682, *Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* 104 I.C.C. 203, presented a situation which arose out of the construction of the Kansas City Union Station and other terminal facilities in Kansas City, Missouri, and Kansas City, Kansas.

Prior to 1906, ten railroads serving Kansas City had used the so-called union depot. The two petitioners here had used the Kansas City Southern's station, the Chicago Great Western being a tenant. The union depot was inadequate and there was a public demand for better facilities. As a result, in 1906, the ten lines organized the Kansas City Terminal Railway Company as a common carrier railroad with an authorized capitalization of 30 million, later increased to 50 million, dol-

lars. Its directorate is composed of a representative of each of the proprietary lines. (R. 99, 104 I.C.C. 208.)

On June 12, 1909, an agreement was entered into by and between the Kansas City Terminal Railway Company, the ten lines, and the Illinois Trust and Savings Bank, as trustee. This agreement was supplemented January 24, 1910, by the inclusion of petitioners, Kansas City Southern and the Chicago Great Western, on equal terms with the original proprietary lines. These two agreements are known as the operating agreement. (Petitioner's Ex. No. 1, R. 16–83; R. 100, 104 I.C.C. 209.)

The operating agreement, the term of which is 200 years, is a mutual engagement covering the construction, maintenance, operation, use and management of the terminals, switching and other services to be rendered the proprietaries. It may be modified only with the assent of the Terminal Company and each of the proprietary companies and the additional assent of the trustee. (R. 107, 104 I.C.C. 215.)

It provides that one-twelfth of the interest accruing on the Terminal Company's outstanding bonds of $50,000,000, and of the taxes and other governmental charges payable by the Terminal Company, and at maturity one-twelfth of the principal of the bonds, shall be assumed and paid over by each of the proprietaries. Maintenance and operating expenses, including overhead and other general outlays, are accounted for and assessed

against each line, by zones used and by calendar months, in the proportion which its use bears to the total use by it and the other lines of the respective zones. Switching services performed by the Terminal Company are at tariff rates, and such special services as are performed by it, at approximately cost. Net revenues derived by the Terminal Company from concessions, or other uses of the terminal facilities or property are credited monthly to the carriers not in default and in the respective proportions of their contributions.

There are further provisions that termination or suspension of any of the rights of a constituent carrier shall not affect the obligation to make the payments required, and others relating to action in case of default, etc. (R. 107, 108, 104 I.C.C. 215, 216.)

Coincident with the execution of the operating agreement a stock-trust agreement was executed between the Terminal Company and the ten, now twelve, proprietary lines, and the Pioneer Trust Company of Kansas City. It provided for transfer of the shares of the Terminal Company's stock and of such further shares as should be offered to and subscribed for by those lines from time to time to the trust company, in trust for the purpose of carrying out the provisions of the operating agreement and as security for their performance, with provisions against acquisitions of such stock by outside interests (R. 100, 104 I.C.C. 209).

The work of construction and unification of the passenger and freight terminals in accordance with plans ultimately adopted was prosecuted and resulted in the opening for business of the new union passenger station November 1, 1914, and the making ready for use and operation the joint terminal facilities. (R. 100, 104 I.C.C. 209.) While the outlay contemplated when the project was initiated was $25,000,000, the ultimate cost was practically twice that amount. (R. 109, 110, 104 I.C.C. 217.)

The Missouri, Kansas & Texas *Railway* Company, one of the proprietary companies, party to the agreements just described, went into receivership and most of its railway lines were purchased at a judicial sale by the Missouri-Kansas-Texas *Railroad* Company. Pursuant to order of the receivership court, the purchaser was given the privilege of electing as to whether it would or would not become one of the proprietary companies as its predecessor had been. It elected not to do so and initiated the proceeding before the Commission by filing on March 10, 1924, a petition whereby was sought of the Commission an order under the authority of paragraph (4) of Section 3 of the Interstate Commerce Act, according to petitioner the right to use designated portions of the union passenger station and the freight terminals of the Kansas City Terminal Railway Company, at Kansas City, Missouri-Kansas. It alleged that the terms imposed upon petitioner for its use of the terminals were unjust, inequitable

and burdensome in that by the operating agreement each of the proprietary lines parties to said agreement is required to pay one-twelfth of the interest and of the taxes, without regard to the extent of the use of the terminal by each such company; that as a small user of the terminal facilities, its payment for interest and taxes is out of proportion to its use. (R. 95, 104 I.C.C. 204.)

All the other users of the terminal filed petitions in intervention. Five of these, known as the larger users, opposed the relief sought; the others, small users, in which group petitioners belong, sought the same relief that the Missouri-Kansas-Texas sought, and also urged that to grant the relief to the Missouri-Kansas-Texas alone would aggravate the situation and unlawfully discriminate against the other users. (Exs. 3 and 4, R. 85–93, also R. 97, 98, 104 I.C.C. 206, 207.)

Hearings were had upon the issues raised by the petitioner, respondent and the interveners. A large volume of testimony was taken and the case was orally argued before the Commission and submitted for determination. Thereafter, the Commission made and issued its report and order, dated November 10, 1925 (Petition, Ex. No. 5, R. 94–135), wherein, after a very full statement of the facts, of which the foregoing is a partial summary, and after setting forth the respective contentions of the parties, including the interveners, it took up con-

sideration of the applicability to the case made of paragraph (4) of Section 3 of the Interstate Commerce Act, upon which the Missouri-Kansas-Texas Railroad Company, and the other small users, including the petitioners here, based their right to relief at its hands.

That paragraph, (4), of Section 3 in brief authorizes the Commission, if found to be in the public interest and not prejudicial to the owning carrier of terminal facilities, to require the use of the terminal by another carrier or other carriers, on terms to be agreed upon between the parties, and, in case of failure to agree, the Commission is authorized to fix a just compensation on principles controlling condemnation proceedings. If the owning carrier is then not satisfied, it is given the right to sue in court for damages sustained because of its compliance with the order or for just compensation for the use, or both.

Concerning this statute and its applicability to the situation presented, the Commission said (R. 113, 104 I.C.C. at 221):

> This paragraph was added to section 3 by the transportation act, 1920, and superseded a limitation upon the requirement of the section that all common carriers subject to the act afford all possible facilities for interchange of traffic between their lines, and for receiving, forwarding, and delivering passengers and property, without discrimination, that this should "not be construed as requiring any such common carrier to

give the use of its tracks or terminal facilities to another carrier engaged in like business."

Controverting respondent's challenge of our power or authority to grant any such relief, the interveners contend that we have power under existing law to relieve them of the obligations imposed by the operating agreement. The contention is not, however, founded upon an analysis of the above-quoted paragraph; nor is any other provision pointed out as in terms conferring upon us any such power to revise a voluntary contract between carriers for the financial support of a joint terminal, not itself in violation of any provision of the act, as we are expressly given by Section 15 (6) to revise divisions of joint rates, subjects of prior agreements between carriers, considered and sustained in *New England Divisions Case,* 261 U.S. 184. The contention rests in part upon judicial decisions recognizing the paramount authority of Congress in the regulation of interstate and foreign commerce, and in certain of them upholding direct exertions of its supreme authority or exercises of the authority committed to us as against existing contracts or conflicting exercises of a State's police power. * * *.

After brief reference to the cases cited in support of the small users' position and the counter contention that what was asked was the reformation of a contract, a power vested exclusively in

courts of equity, the report continued (R. 114, 115, Rept., pp. 222, 223):

> * * * Other considerations enter into a contract which is impressed with a public interest, whether a contract between carriers or between them and a State or municipality, the provisions of which encroach upon the latent or exerted authority of Congress under the commerce clause of the Constitution. The underlying principle considered, no such contract can be placed beyond the reach of a competent exercise of such authority merely by the inclusion therein or the relation thereto of outside interests not themselves subject to the act, however cautiously the power should be exercised in such cases. Nor does the fact that franchise grants are among the mutual covenants make it immune, as was settled in *New York* v. *United States, supra,* where in the interest of interstate commerce we had exercised a supervening authority expressly granted to us. * * *
>
> The paragraph above quoted empowers us, when found to be in the public interest and practicable, without impairing the ability of a carrier "owning or entitled to the enjoyment of terminal facilities" to handle its own business, to require the use of the facilities by "another carrier" or "other carriers" upon terms and for compensation to be agreed upon or to be fixed as provided. The primary power to be exercised is to "require the use" of the terminals, which

power the further power to fix the compensation in appropriate circumstances merely supplements. The requirement is to be laid upon a carrier then "owning or entitled to the enjoyment" of the facilities and for the benefit of "another carrier" or "other carriers"; in other words, to be laid upon a carrier owning or by lease or otherwise entitled to present enjoyment and for the benefit of a carrier or carriers not so owning or entitled.

Obviously, the interveners are not in the latter situation. They have been and are in all respects entitled to the past, present, and future enjoyment of the terminals in question, and have enjoyed and now enjoy them in their own right as virtual coproprietors. They and the other proprietary lines have the equitable title to the property and franchises in undivided equal shares, and through their corporate instrument, the respondent, the facilities are controlled and operated. Not only so, those interveners, equally with the other proprietaries, have been and still are parties to the operating agreement, and to accord them the desired relief would necessarily involve to that extent what would amount to a revision or reformation of that agreement. They do not seek an abrogation of the entire agreement as wholly invalid and not to be binding upon them in any part, but merely, however stated, that certain of its provisions be in effect rewritten. A contention by the Alton

> that it would not in terms require a revision of the agreement, but merely a revision of the charges now imposed upon that line, would seem to express a distinction without a difference. Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed. The power and authority thus invoked are not conferred by the quoted paragraph.

The report then took up the question of the applicability of Section 15a of the Act, insofar as it provides that the Commission shall initiate, modify or adjust reasonable rates so that the carriers as a whole or in groups will under honest, efficient, and economical management earn a net railway operating income equal to a fair return on the aggregate value of their railway property used in transportation service.[1] Answering a contention that under that provision the Commission need only find that the operating agreement is so burdensome as to result in inefficient management, to cause misapplication by the railways involved of funds created for an entirely different purpose, and generally to impair their ability to furnish adequate service, it was said (R. 116, Rept. p. 224):

> * * * However desirable it might be in particular instances, we are unable to spell

[1] Section 15a (2) was amended by Transportation Act, 1933. Both the old and new paragraphs are set out in the appendix.

> out from that provision such a jurisdiction. What the provision requires or authorizes us to do is to fix remunerative reasonable rates in circumstances which embrace honest, efficient and economical management as a condition or limitation. We should have the information in that respect which will aid an effective exercise of our duty and authority, but we are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers. Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act.

It then passed upon the asserted violation caused by the agreement of paragraphs (1) and (3) of Section 3 of the Act and said (R. 116, Rept. p. 224):

> Paragraphs (1) and (3) of section 3 are put forward as vitiating the operating agreement in so far as it provides for the equal division of interest and taxes. Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect whatsoever, chargeable to any common carrier or carriers subject to the act. Paragraph (3) commands the maintenance of appropriate facilities

for the interchange of traffic between carriers, and for the receipt, forwarding, and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

The conclusion, so far as petitioners are concerned, was (R. 117, Rept. p. 225):

> An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee, and Alton.

Such an order was entered on November 10, 1925. (R. 135).

The case upon the petition of the Missouri-Kansas-Texas was continued pending the outcome of litigation testing the question of whether it was bound by the terms of the operating agreement.[2] This was subsequently decided in favor of the Missouri-Kansas-Texas' contention that it was not so bound and thereafter the case was heard by the Commission June 1, 1933, on the question of just and reasonable compensation for its use of the terminal, the Commission having held that as to that railroad it had jurisdiction under Section 3 (4) provided it was not bound by the agreement.

In 1931, the petitioners filed petitions for a rehearing of the Commission's order dismissing their petitions in intervention but these were denied by the Commission on June 1, 1931. (Petition, par. (13), R. 10.)

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[2] Pending final disposition of the proceedings, the Commission issued an emergency order pursuant to paragraph (15) of Section 1 of the Act, permitting the Missouri-Kansas-Texas to use the terminals, under the terms of the operating agreement; payments thereunder not to be the final measure of compensation (R. 95).

Proceedings in Court

The petition for mandamus filed in the Supreme Court of the District on May 31, 1933, is cast on the theory that the action of the Commission in dismissing petitioners' intervening petitions was erroneous in law and constituted a denial of a jurisdiction conferred upon it by the Interstate Commerce Act; that in refusing to exercise this asserted jurisdiction, the Commission acted arbitrarily and contrary to law and denied to petitioners their lawful rights. (Petition, pars. (16), (17), (18), R. 13.)

Petitions to intervene as parties respondent were filed by the Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and the Kansas City Terminal Railway Company (R. 208; 227); they were allowed (R. 209, 210, 229) and their answers were filed (R. 210, 229). At the hearing the Missouri Pacific Railroad Company was admitted as a party to the intervention filed on behalf of the Santa Fe and others. (R. 240.)

The case was heard upon the petition, answer of the Commission, the answers of the interveners, and petitioners' demurrer to said answers. The Court overruled the demurrer, and the petitioners electing to stand upon their demurrer, judgment was entered dismissing the petition (R. 239). An appeal was noted, (R. 239) and, on May 7, 1934, the

Court of Appeals of the District affirmed the judgment of the lower court. (R. 245.)

SUMMARY OF THE ARGUMENT

1. Under the issues raised in the proceeding before the Commission there devolved upon it the interpretation of the applicable provisions of the Interstate Commerce Act in the light of the facts adduced at the hearing. That the Commission entertained the intervening petitions of petitioners and others, proceeded to hear the evidence, considered the facts and applied the law to the facts is manifest from its report. The denial of the relief sought was just as much an exercise of jurisdiction as the awarding of the relief would have been. Jurisdiction is the power to decide and does not depend upon a correct decision. *Fauntleroy* v. *Lum,* 210 U.S. 230, 235; *Binderup* v. *Pathe Exchange,* 263 U.S. 291, 305–306. So even if the Commission's action were erroneous, that error arose from an exercise, not a denial, of jurisdiction. *General Investment Co.* v. *N. Y. Cent. R.R.,* 271 U.S. 228, 230–231; *Butte, Anaconda & Pac. Ry. Co.* v. *United States,* 290 U.S. 127.

2. To decide the matter presented, the Commission was called upon to construe the statutes involved. The discharge of that duty involved the exercise of judgment and discretion. *Hall* v. *Payne,* 254 U.S. 343. It is well settled that the decision of an executive officer or of a tribunal, made in the discharge of a duty imposed by law and involv-

ing the exercise of judgment and discretion, may not be reviewed by mandamus. That writ may not be used to coerce the judgment and discretion of such an officer or tribunal or as a substitute for a writ of error. *Ness* v. *Fisher,* 223 U.S. 683, and cases cited, page 692; *Knight* v. *Lane,* 228 U.S. 6, 13; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U.S. 549; *I.C.C.* v. *Waste Merchants Ass'n.,* 260 U.S. 32; *Work* v. *Rives,* 267 U.S. 175, 183; *I.C.C.* v. *Campbell,* 289 U.S. 385, 393, 394. If the action of the Commission was arbitrary or unreasonable, a case for mandamus might arise. But we think that the least that could be said of the Commission's conclusions and order is that they were not arbitrary or unreasonable and that the construction and application of the statutes were permissible. This being so, there is no warrant or occasion for the issuance of this extraordinary writ.

3. The Commission's construction of the statutes involved was not only reasonable and not arbitrary, but on the contrary correct. The statutes involved and relied upon by petitioners in the proceeding before the Commission clearly do not cover or apply to the case made.

ARGUMENT

I

The Commission took jurisdiction of the case, considered and determined it on the merits

The Commission's report shows a painstaking and thorough study and consideration of all the fac-

tors in the case. It goes fully into all the pertinent facts, discusses the status and situation of the petitioners and the other parties to the proceeding, details the conditions which gave rise to the proposition for the new union station and the facilities connected therewith, the plan which was adopted to consummate the project, the various agreements voluntarily entered into by the railroads to insure the project, and takes up the various contentions and views of the interested parties.

The conclusion of the Commission was that a case warranting relief under the applicable law had not been made out by the intervening small users. Hence, these petitions were dismissed.

This action was predicated upon the holding (1) that the small users did not come within the purview of paragraph (4) of Section 3 of the Interstate Commerce Act, which empowers the Commission under certain conditions to compel a carrier to allow the use of its terminal facilities to another carrier, since they were already using the terminal facilities under voluntary agreements while the statute contemplated a case where use is not had but is desired and compulsion is necessary to force the unwilling terminal owner to allow use, (Report, R. 114, 115, 104 I.C.C. 222, 223); (2) that section 15a of the Act, which provides that the Commission shall initiate, establish or adjust rates so that the carriers of the country as a whole or by groups, shall earn a fair return, did not apply to a case

such as presented or authorize the Commission to revise or reform a contract such as that involved in the case before it, (Report, R. 115, 116, 104 I.C.C. at pp. 223, 224); (3) that there was no showing of a violation of paragraph (1) of Section 3 which prohibits any undue prejudice or preference, caused by the distribution of the charges provided for in the operating agreement, because those charges are capital charges, not based upon the use of the terminal property, (Report, R. 116, 104 I.C.C., at p. 224); and (4) that there was no showing of a violation of paragraph (3) of Section 3 which requires affording of equal facilities for interchange of traffic, etc., without discrimination, because the charges provided for in the operating agreement and from which relief was sought were essentially capital charges and have no relation, direct or indirect, to the interchange of traffic, (Report, R. 116, 104 I.C.C. at p. 224).

In the light of the report and the conclusions reached, it seems plain enough that the Commission took jurisdiction of the case and decided it upon the merits. To assert that jurisdiction was denied is merely to confuse terms. Whether the petitioners here and the other parties to the proceeding had made a case entitling them to relief under these provisions of the applicable law, was the very thing which by their intervening petitions had been submitted for adjudication, and which they thereby conceded was a matter committed to the Com-

mission. That the Commission denied relief is not equivalent to denying jurisdiction. It was as much an exercise of jurisdiction when the Commission made its decision that the facts did not make a case warranting relief and dismissed the intervening petitions as it would have been had the Commission awarded the relief sought. Even if it had committed an error by misconstruction of the applicable law, it did not transcend its jurisdiction because jurisdiction does not depend upon a correct decision. The distinction between jurisdiction and merits is plain. One goes to the power, the other only to the duty of the court. *Fauntleroy* v. *Lum,* 210 U.S. 230, 235. Jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue. *Binderup* v. *Pathe Exchange,* 263 U.S. 291, 305, 306. By jurisdiction is meant the power to entertain a case, consider the merits and render a binding decision; by merits is meant the various elements which enter into or qualify the right to the relief sought. There may be jurisdiction and yet an absence of merits. *General Investment Co.* v. *N.Y. Central R.R.,* 271 U.S. 228, 230, 231.

The recent decision in *Butte, Anaconda & Pacific Ry. Co.* v. *United States,* 290 U.S. 127, is precisely in point on this phase of the case. There the United States sued the railroad company to recover money paid to it under a certificate issued by the Commission under Section 204 of the Transportation Act

1920, which provided for payment to a carrier engaged in general transportation which had been operated under its own management during the period of Federal control and which had sustained a deficit in operating income as defined in that section. It was asserted that the certificate had been issued under an erroneous construction by the Commission, later changed, of the meaning of "deficit", as used in the statute, and hence that the Commission had no authority to issue the certificate or the officials of the Treasury to make payment to the railway company.

Speaking of that contention the Court said it had no occasion to determine which one of the Commission's interpretations of the word "deficit" was the correct one, because it was of opinion that the Government could not recover, even if the Commission had erred. It then said (p. 136):

> The decision was on the merits. The case is no different than it would have been, if the Commission had erred in any other ruling on a matter of law; or in a finding strictly of fact; or in some finding as to maintenance, depreciation or value—determinations called findings of fact but which rest largely in opinion. In making those decisions the Commission would necessarily act in a *quasi*-judicial capacity. If it misconstrued the term "deficit", it committed an error; but it did not transcend its jurisdiction. * * *

Then, after referring to numerous questions which the Commission would have to determine in inter-

preting the provisions of Section 204, the Court said (p. 141):

> While Sec. 204 granted a bounty, it conferred a right, and constituted the Commission a *quasi*-judicial tribunal to adjudicate claims thereunder. Thus it was called upon to pronounce a formal judgment on rights asserted. A decision adverse to the carrier on any one of the suggested questions of construction might compel dismissal of the claim; thus relieving the Commission of the necessity of enquiring whether a deficit had been suffered. But it does not follow that such a decision would determine an issue of jurisdiction. Under this legislation, whether a claimant seeking "relief has the requisite standing is a question going to the merits and its determination is an exercise of jurisdiction." Compare *General Investment Co.* v. *New York Central R.R.*, 271 U.S. 228, 230. * * *.

The analogy between the cited case and the case at bar is clear.

In the recent decision of *Miguel* v. *McCarl*, 291 U.S. 442, 451, this Court said:

> The principal question upon which the case turns, and the only one we need consider, is whether the statutes involved so plainly require the payment of the voucher that such payment constitutes a mere ministerial act on the part of the disbursing officer. Following numerous cases theretofore decided, the applicable rule in respect of the writ of mandamus is stated in *Wilbur*

v. *United States*, 281 U.S. 206, 218–219, as follows:

"Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.

"The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."

In the mandamus case of *Interstate Commerce Commission* v. *New York, New Haven & Hartford*

R. Co., 287 U.S. 178, 203, the Court pointed out that the duty there sought to be compelled by mandamus, "has been imposed upon the Commission too vaguely and obscurely to be enforced by a mandamus."

II

The decision of the Commission made in the exercise of its judgment and discretion in a matter committed to it by Congress is impregnable to mandamus

The precise question under this head is not whether the decision of the Commission is right or wrong, but whether it was made in the exercise of judgment and discretion and not arbitrarily.

This decision turned upon the application of the law to the facts, and necessarily required the interpretation and construction of the Interstate Commerce Act, the particular provisions of which have already been alluded to. There is no substantial, if any, dispute as to the correctness of the facts found by the Commission.

Now it is settled that the construction and interpretation of a statute is a judicial and not a ministerial function. *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316; *Ness* v. *Fisher*, 223 U.S. 683; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U.S. 549.

In *Hall* v. *Payne*, 254 U.S. 343, a mandamus case, the Court, speaking of the Act there in question and the Secretary of the Interior's construction of it, said (p. 347):

> * * * He could not administer or apply the act without construing it, and its con-

struction involved the exercise of judgment and discretion. * * *.

Since the Commission was called upon to construe the law in the determination of the issues raised in the proceeding and thus required to exercise its judgment and discretion, its action resulting therefrom cannot be reviewed in a proceeding in mandamus. This rule is well settled. It was stated in *Ness* v. *Fisher*, 223 U.S. 683, wherein the Court refused to review a construction placed upon an act by the Secretary of the Interior, thus (p. 691):

> So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative. *Decatur* v. *Paulding*, 14 Pet. 497, 515; *United States ex rel. Tucker* v. *Seaman*; 17 How. 225, 230; *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *United States ex rel. McBride* v. *Schurz*, 102 U.S. 378; *United States ex rel. Dunlap* v. *Black*, 128 U.S. 40, 48; *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 324. * * *.

In *Alaska Smokeless Coal Co.* v. *Lane*, 250 U.S. 549, 555, it was said:

> * * * where there is discretion * * * even though its conclusion be disputable, it is impregnable to mandamus.

In *Hall* v. *Payne*, 254 U.S. 343, speaking of the Act there in question and the Secretary's construction of it, it was said (p. 348):

> * * *. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus. * * *.

To the same effect are *Knight* v. *Lane*, 228 U.S. 6; *Int. Com. Comm.* v. *Waste Merchants Assn.*, 260 U.S. 32; *Work* v. *Rives*, 267 U.S. 175.

Two recent cases may also be cited. In *Interstate Commerce Commission* v. *Campbell*, 289 U.S. 385, mandamus was sought to compel the Commission to make an award of damages in a case wherein the Commission had found discrimination against relator and ordered it removed; damages were not awarded because the Commission found and declared that "the record would not support an award of damages." It was asserted that under the facts stated in the Commission's report it was clear that damages had been sustained and that denial of them was an abuse of discretion and a breach of a ministerial duty, and an arbitrary with-

holding. Holding that mandamus would not lie, this Court said (pp. 393, 394):

> * * * Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact. If the Commission had declined to listen to the claim for reparation, or finding reparation due had declined to order payment, mandamus might have been available to hold it to its duty. That is not what happened. The Commission heard the complaint and proceeded to a decision. If the mandamus were to stand, the result would not be to compel the Commission to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action. *Interstate Commerce Commission* v. *Waste Merchants Assn.*, 260 U.S. 32, 34; *Wilbur* v. *Kadrie*, 281 U.S. 206, 218; *Interstate Commerce Commission* v. *N.Y., N.H. & H. R.R. Co.*, 287 U.S. 178, 204.
>
> The policy of the law has been to give finality to orders of the Commission negative in form and substance, and to keep them out of the courts. *Standard Oil Co.* v. *United States, supra; Alton R.R. Co.* v. *United States, supra; Procter & Gamble Co.* v. *United States, supra; B. & O. R.R.*

Co. v. *Brady, supra.* A dissatisfied complainant is not permitted to escape these limitations indirectly by broadening the functions of mandamus when he is barred from more direct review. *I.C.C.* v. *Waste Merchants Ass'n, supra,* p. 35. * * *.

And in *Butte, Anaconda & Pac. Ry. Co.* v. *United States, supra* (290 U.S. 127, 142), it was said:

> * * * Though it were charged that the Commission erred in so dismissing the claim, the carrier could not by mandamus compel it to proceed with the enquiry. See *Abilene & Southern Ry. Co.* v. *Interstate Commerce Commission,* 8 F. (2d) 901; *Cripple Creek & Colorado Springs R.R. Co.* v. *Interstate Commerce Commission,* 11 F. (2d) 554; *Empire & S.E. Ry. Co.* v. *Interstate Commerce Commission,* 45 F. (2d) 292; *Interstate Commerce Commission* v. *Arcata & Mad River R.R. Co.,* 65 F (2d) 180. Compare *Interstate Commerce Commission* v. *Humboldt Steamship Co.,* 224 U.S. 474; *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U.S. 638.

The opinion of the Court of Appeals of the District is very clear in its discussion of this phase of the case. The Court said:

> The Commission, we think, share this view, and it is clear would have revised the contract accordingly if they could have interpreted the statutes broadly enough to justify such action. But appellants tell us

that the statute is broad enough and that, in the view they are entitled to take, the refusal of the Commission to grant the relief is not grounded on a misinterpretation of the statute, but is in every respect a denial of jurisdiction. In support of this they quote from the opinion certain statements to the effect that "the power and authority thus invoked are not conferred by the quoted paragraph [the statute]", and again, "we are unable to find the requisite power or authority in any other provision of the act", and "we are unable to spell out from that provision such a jurisdiction." These statements they say indicate the view of the Commission that it was without jurisdiction. But we think the appellants' position in this respect is grounded upon a mistaken theory. It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask. The Commission is an administrative body and can exercise only the powers delegated to it by Congress, but in the application and interpretation of the powers conferred it exercises judgment and discretion, and it was clearly in the exercise of these that it used the language in the quoted sentences above. If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion. And we may remark in passing that to jus-

tify the Commission in the exercise of such authority as is asked, the right to do so should be expressed in clear and certain language. Congress has conferred on the Commission broad powers for the purpose of avoiding discriminations, preferences, and inequalities, and has likewise given it power to regulate the interchange of traffic and the distribution of cars, to revise extortionate exactions under trackage agreements, to enforce the use by one carrier of the terminal facilities of another, and indeed to take all necessary steps to maintain an adequate railway service, but it is going too far to say that all or any of these powers of themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist. The case is, of course, different if the contract either then or subsequently violates a specific law of the United States. Cf. *L. & N. R.R.* v. *Mottley*, 219 U.S. 467. In cases in which it does not, it may well be that only the most pressing public necessity would justify the Congress in delegating to an administrative body jurisdiction to destroy a valid contract and substitute another of its own making, and the Commission would not be justified in assuming Congress had done so except when the authority was clear, for the inviolability of contracts is a cardinal principle of our business and social life.

> The States are forbidden to pass any law impairing them, and as far back as the ordinances for the government of the Northwest Territory it was stated as a primary principle that in the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force, that shall in any manner whatever interfere with or affect private contracts or engagements bona fide, without fraud, previously made. This is no more than the recognition of a fundamental principle, as true now as then, that contracts, as vesting rights of property, ought to be protected from interfering legislation. (R. 253–255.)

Under the authorities it is certain that there was no warrant for the issuance of the writ applied for by petitioners.

III

The decision of the Commission was not arbitrary; it was a reasonable construction of the provisions of the statute, indeed a correct one

We might well rest the case upon the points already discussed, but we think it well to consider the provisions of the statute to show the reasonableness, indeed the correctness, of the Commission's construction of them.

First, as to paragraph (4) of Section 3. That paragraph provides:

> If the Commission finds it to be in the public interest and to be practicable, with-

out substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

The very language shows that the power which the statute imposed on the Commission was a compulsive power upon an unwilling terminal owner to allow use of the terminal by another carrier, who desired but could not otherwise obtain use of the facilities.

The provisions for compensation and the methods which are prescribed for fixing it all indicate that the allowance of the use by the owning carrier is involuntary. This is emphasized by the assimilation of the procedure in condemnation cases to the determination of compensation when the parties cannot agree on that matter, or are dissatisfied with the Commission's determination of the amount of compensation.

Plainly the proceeding contemplated is adversary in character and does not relate to a voluntary arrangement between the carriers.

The petitioners are not in such situation as to be entitled to the relief which they sought of the Commission. They are already using the terminal facilities, they have a contract or agreement voluntarily entered into years ago by which their right to occupy and use the terminal facilities was secured and by which they assumed obligations in consideration for the right so secured. Further, they, as pointed out by the Commission, are in the status of proprietors of the facilities, along with the ten other "proprietary companies." Thus, upon the facts, they did not bring themselves within Section 3 (4).

The Commission has construed this paragraph as applying to involuntary allowance of use. In *Hastings Commercial Club* v. *Chicago, M. & St. P. Ry. Co.*, 69 I.C.C. 489 (decided July 10, 1922), it said (p. 493):

> Prior to its amendment by the transportation act, 1920, that part of section 3 which relates to the interchange of traffic between connecting carriers specifically provided that it should not be construed as requiring any common carrier to give the use of its "tracks or terminal facilities" to another carrier engaged in like business. As amended by the transportation act this provision of the law gives us a direct and explicit power to require the use by one carrier of the "terminal facilities" of another carrier upon certain conditions. It is apparent that the policy of Congress was thus reversed. Where it had formerly safeguarded the carrier in the exclusive use of its terminals, it now recognized that there is a broader interest than that of the individual carrier whose property rights happened to be involved, viz, that of the public. The object of the statute was to make more flexible the use of existing terminal facilities, and while the power thus granted to us is to be exercised upon careful consideration of each situation, it is but an extension of the general principle that in many instances, and from the very nature of the business of a common carrier, the interest of the public

imposes important qualifications on the manner of use of the property employed in the carrier service.

In *Long Island R.R. Co. Trackage,* 162 I.C.C. 218, the Long Island and the Pennsylvania had entered into an agreement for trackage rights into and use of the Pennsylvania's station at New York City by the Long Island. A certificate of public convenience and necessity for such operation, under Section 1 (18) of the Interstate Commerce Act was applied for and also an order of the Commission, under Section 3 (4), requiring the use of the tracks and facilities upon the terms already agreed to by the parties. The Commission dismissed the application under Section 3 (4), saying (p. 220):

> * * * As to section 3 (4), which provides for the compulsory opening of one carrier's terminal facilities to another carrier when the public interest requires such use, there is nothing in the situation here presented which brings it within the terms of that paragraph. By voluntary arrangements between the parties the Long Island has been using the tunnel, yard, and terminal facilities provided for it by the Pennsylvania in New York since September 8, 1910. There is no suggestion that the Pennsylvania intends to discontinue this privilege. The question of compensation is indeed at issue, but contrary to the applicants' understanding of the force of this fact, associated as it is with the close corporate relationship between the companies, the applicability of sec-

> tion 3 (4) does not appear. Accordingly, the fixing of compensation as therein provided on the principle controlling compensation in condemnation proceedings, may be disregarded. That part of the application which is under section 3 (4) will therefore be dismissed. * * *.

As finally authoritative, we cite *Railroad Commission* v. *Southern Pac. Co.*, 264 U.S. 331, which involved the Los Angeles Union Passenger Station project. Speaking of several provisions of the Transportation Act, 1920, it was said (pp. 343, 344):

> * * * It not only provides for the temporary expropriation of terminals and main track of one railway to the common use of one or more other railways in an emergency, but it also contemplates the compulsory sharing of one company's terminals with one or more companies as a permanent arrangement. This is a drastic limitation of a carrier's control and use of its own property in order to secure convenience and dispatch for the whole shipping and traveling public in interstate commerce. It gives to the Interstate Commerce Commission the power and duty, where the public interest requires, to make out of what is the passenger and freight station of one interstate carrier, a union station or depot.

A reference to the legislative history of the bill which became the Transportation Act shows that Congress was providing for *compulsory* sharing

of terminal facilities. In House Report No. 456, 66th Congress, 1st Session, it was said of this provision:

> Under section 405 the commission may require the terminals of any carrier to be open to the traffic of other carriers upon such just and reasonable terms and conditions, including just compensation to the owners thereof, as the commission, after full hearing, upon complaint or upon its own initiative, may by order prescribe. The advantages of joint use of terminals have been fully demonstrated under Federal control, and it is to preserve these advantages that the above power has been granted to the commission in this bill. While the question of compensation may present some difficulties, these can be overcome. The right of the individual carrier to the exclusive use of its own property should be made to yield to the superior right of the public. In these days, when the cost of terminals in the larger cities is almost prohibitive, the joint use of terminals under regulations prescribed by the commission will result in large economies in operation, and in many instances add to the convenience of the public.

And in House Report No. 650, 66th Congress, 2nd Session, it was said:

> Section 405 of the House bill provided that the commission might require the terminal of any carrier to be open to the traffic of other carriers upon such terms and for such compensation as the commission might pre-

scribe. The Senate amendment, in section 11, provided that the transportation board might require one carrier to permit another carrier to use its "terminal, or other facilities including main-line track or tracks for a reasonable distance outside of such terminals," on such terms as the carriers might agree on or as the board might fix. Section 405 of the conference bill contains provisions on this subject similar to those in the Senate amendment. It is provided that the commission, if it is found to be in the public interest and practicable, may require one carrier to allow another to use its terminal facilities "including main-line track or tracks for a reasonable distance outside of such terminal," on such terms as the carriers may agree upon, or as the commission may fix, subject to the right, however, of the carrier whose terminal facilities are thus thrown open to sue for any damages sustained, or any compensation owed.

Respecting Section 15a, the Commission's conclusion that the case did not come within its purview is so patently correct that we need not labor the point, the statement in the report being amply sufficient to dispose of it. We quote (R. 115, 116, 104 I.C.C. at pp. 223, 224):

> Certain of the interveners cite the provision of Section 15a of the act, that we shall initiate, modify, establish, or adjust reasonable rates so that the carriers of the country, as a whole or by groups, will, under honest, efficient, and economical management and

reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of their railway property held for and used in the service of transportation. They contend that, giving effect to the policy reflected in that provision and without waiting until a carrier's bankruptcy shall ensue, we need only find as a fact that the operating agreement, improvidently entered into, is so burdensome to them as to result in inefficient and uneconomical operation of their railways, to cause misapplication by them of funds created for an entirely different purpose, and generally to operate to impair their ability to furnish adequate railway service, and our jurisdiction for the purpose of the desired relief will at once attach. However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. What the provision requires or authorizes us to do is to fix remunerative reasonable rates in circumstances which embrace honest, efficient, and economical management as a condition or limitation. We should have the information in that respect which will aid an effective exercise of our duty and authority, but we are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers. Neither expressly nor by implication does the provi-

> sion embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act.[3]

The basis for the claim of discrimination, in support of which paragraphs (1) and (3) of Section 3 of the Act were brought forth, is that the small users of the terminal are required to sustain the same burden as the large users so far as the capital charges are concerned, one-twelfth of the interest on the bonds of the Terminal Company, and of the taxes and of the principal of the bonds; that that is unjust because their use of the terminal facilities is so much less than of the large lines and that if the Commission held that the Missouri-Kansas-Texas Railroad was entitled to an order under paragraph (4) of Section 3 and thus was relieved of any obligations as a proprietary company, the burden and discrimination would be

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[3] The rule of rate-making laid down in Section 15a (2) was changed by the amendment of that provision contained in the Act of June 16, 1933, 48 Stat. 220, which requires the Commission to "give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service." See *Florida* v. *United States*, 292 U.S. 1, 5–7.

greater since the remaining eleven proprietary companies would have to assume an equal share of the one-twelfth interest of the former Missouri, Kansas & Texas Railway's interest.

Paragraphs (1) and (3) of the section are as follows:

> (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.
>
> (3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

The Commission, in considering this claim of discrimination, said (R. 116, 104 I.C.C. at p. 224):

> Paragraphs (1) and (3) of section 3 are put forward as vitiating the operating agreement in so far as it provides for the equal division of interest and taxes. Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect whatsoever, chargeable to any common carrier or carriers subject to the act. Paragraph (3) commands the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable

titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

We submit that this was a reasonable conclusion upon the facts presented to the Commission.

There is no preference or discrimination in either the "capital charges" or in the "user charges." As to the former, the railroad companies are on an *exact equality;* each is obligated to pay one twelfth of the "fixed charges." As to the latter, there is no claim of discrimination or preference, nor could there be because the rate of charge is the same, the carriers paying in proportion to the use made of the facilities. Hence, there is no violation of paragraph (1) of Section 3.

It is also clear that the facts of the case do not show any violation of paragraph (3) of Section 3. There is no basis for the claim that there is any failure to furnish or afford "reasonable, proper, and equal facilities for the interchange of traffic," etc. Indeed, the operating agreement requires and provides that the use of such facilities as are avail-

able shall be furnished without discrimination. Article I, Section 3 of that instrument obligates the Terminal Company to "furnish motive power, switch, move and handle the passengers of the Railway Companies, * * * upon or over the Terminal Facilities or any part thereof, without preference or discrimination * * *." By Section 4 of that Article the Terminal Company gives and grants to each of the railway companies "the right and privilege, * * * of running its freight trains, drawn by its own motive power and manned by its own crews, upon and over said Terminal Facilities or any part thereof * * *." By Section 5 of the same Article, the Terminal Company agrees that it will "for all internal movements thereof, furnish motive power, switch, move and handle the freight cars of the Railway Companies, respectively, as herein provided, upon or over the Terminal Facilities, or any part thereof, without preference or discrimination, for which service charges shall be made by the Terminal Company at such rates as may be established by it from time to time." (R. 22, 23.)

In Article III, Section 1, it is provided that the Terminal Company "shall establish rules and regulations governing the operation of trains within and upon the Terminal Facilities *and the use* and *enjoyment* thereof in all other respects; provided, always, that such rules and regulations shall be fair and equitable and shall apply *equally* and *without discrimination* to all the Railway Com-

panies using the Terminal Facilities * * *." (Italics supplied.) (R. 36.)

In view of these provisions it cannot be doubted that there is no failure to "afford all reasonable, proper, and equal facilities."

So far as discrimination in rates, fares and charges between connecting lines is concerned, it may be pointed out, in addition to what has just been said, that the words "rates, fares and charges" are the same words as appear in Section 1 (4), relating to reasonableness, and Section 6, relating to filing tariffs of charges, and apply to and concern compensation for transportation services and therefore would have no application to "capital charges." Moreover, the Kansas City Terminal Company files tariffs covering its terminal switching service. (Report of Commission, R. 107, 104 I.C.C. at 215).

Now it is important to note that no breach of the terms and covenants of the operating agreement is alleged. On the contrary the burden of the complaint is that the agreement is being enforced. That the petitioners by this suit, as by the proceeding before the Commission, seek to avoid the obligations of the contract in respect of the "capital charges," will not be denied. However, this agreement which is the bone of contention between the "small users" and the "large users" of the terminal facilities, was entered into voluntarily; the only compulsion, if such it may be called, was that of the public sentiment in Kan-

sas City which was enthusiastic for a union station. There was nothing ambiguous about the terms, particularly that part which dealt with the obligations as a proprietary company; the small users must have then been aware that their use of the facilities would not be as great as that of the large users. That they found the burden greater than they had foreseen and that it has become a heavy burden, while regrettable, does not of itself entitle petitioners to relief at the hands of the Commission from the obligations of that contract.

In saying this we do not lose sight of the principle laid down in cases such as *L. & N. R.R.* v. *Mottley,* 219 U.S. 467, that contracts valid when negotiated may be abrogated by the exercise by Congress of the authority which it has under the Constitution to regulate commerce between the states, but as the Commission in its report points out, in those cases there was a definite grant of authority (R. 113, 114, 104 I.C.C. at 221, 222), or a specific enactment by which certain kinds of contracts were declared void or rendered unenforceable.

These companies, parties to the agreement, in effect became partners in the enterprise and to assure the consummation of it, agreed to assume an equal share of what may be called the fixed charges. It is difficult to see where discrimination exists in such a situation, especially discrimination under the Act. Whether the alleged inequality created

by, or existing under, the contract was a discrimination, was a matter particularly for the judgment of the Commission, for it is well settled that what constitutes unreasonable or unjust discrimination is a question of fact, and the determination of whether a discrimination is unjust or unreasonable is ordinarily left to the Commission, whose finding is conclusive, when supported by substantial evidence. *Texas & Pac. Ry. Co.* v. *I.C.C.*, 162 U.S. 197, 219, 220; *I.C.C.* v. *Alabama Midland Ry. Co.*, 168 U.S. 144, 170; *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 481; *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 663.

There is another ground upon which the Commission might properly have predicated its conclusion that a case was not presented under paragraph (1) of Section 3, instead of *assuming* for the purposes of the decision, the applicability of that paragraph. That ground is that the paragraph does not cover a discrimination between common carriers. In *Oklahoma-Arkansas Tel. Co.* v. *Southwestern Bell Telephone Co.*, 183 I.C.C. 771, the Commission, considering a complaint of alleged discrimination by one telephone company against another, said (p. 774):

> * * * It is extremely doubtful whether section 3 (1) could be interpreted as applying to a discrimination between common carriers. The cases previously referred to had to do with prejudice and preference between shippers. In *Delaware, L. & W. R.*

> *Co.* v. *Kutter,* 147 Fed. 51, the Circuit Court of Appeals, Second Circuit, referring to this provision of the law, said: "The wrong prohibited by the section is a discrimination between shippers." Certiorari was denied by the Supreme Court, 203 U.S. 588. The legislative history of this paragraph of section 3 appears to support the view that discrimination between shippers was the only thing aimed at. If this were not so, the provisions of section 3(3), which specifically prohibited discrimination between carriers of passengers or property, would seem to be superfluous. We are constrained to hold, therefore, that a situation of prejudice or preference between common carriers is not comprehended by the provisions of section 3(1).

We submit that the Commission's decision was not only reasonable, but indeed correct.

The order which is sought to be set aside was entered November 10, 1925, nearly eight years before this suit was filed; the petitions for rehearing were not filed until 1931, more than two years prior to the filing of the suit.

We call attention to the fact that a considerable amount of the bonds of the Kansas City Terminal Company was sold after the order of the Commission of November 10, 1925. (R. 240.) It may fairly be inferred that they were purchased on the faith of the Commission's decision and order and that the bondholders would be prejudiced if the constituent carriers were to have the privilege of

withdrawing from their obligations in respect of the "capital charges", and prejudice would likewise result to the Kansas City Terminal Company. Furthermore, the Commission had held, under Section 3 (4), the Missouri-Kansas-Texas entitled to use of the terminal facilities and had continued the case for the purpose of determining the compensation which should be paid for that use. Such hearing and decision has been had. (198 I.C.C. 4.) If petitioners were successful in this suit, then the Commission would be under the necessity of a new hearing to determine the compensation which should be exacted of them, whereas had the suit been seasonably filed and had resulted favorably, the question of compensation could have been passed upon at one time and hearing as to all who desired to withdraw from the operating agreement.

CONCLUSION

It is respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia, sustaining the action of the trial court in dismissing the petition for a writ of mandamus, was correct and should be affirmed.

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SEPTEMBER, 1934.

APPENDIX

The Statutes Involved

The pertinent provisions of the applicable law are the following sections of the Interstate Commerce Act, U.S. Code, Title 49, c. 1:

Section 1 (15):

> Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people upon such terms of compensation as between the carriers as they may agree upon, or in

the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

Section 3 (1):

That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 3 (3):

All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

Section 3 (4):

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier

whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Section 15a (2):

In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

Section 15a (2), as amended by Transportation Act, 1933:

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other

factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 234

THE UNITED STATES OF AMERICA, EX REL. CHICAGO Great Western Railroad Company and the Kansas City Southern Railway Company, petitioners

v.

INTERSTATE COMMERCE COMMISSION ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

No opinion was rendered by the Supreme Court of the District. The opinion of the Court of Appeals (R. 199) is reported in *United States, ex rel. Chicago Great Western R. Co. et al.* v. *Int. Com. Comm. et al.*, 71 F. (2d) 336. The report of the Interstate Commerce Commission (R. 69) is reported in *Missouri-Kansas-Texas R. R. Co.* v. *Kansas City Terminal Co.*, 104 I. C. C. 203.

JURISDICTION

By petition filed May 31, 1933, the Chicago Great Western Railroad Company and The Kansas City Southern Railway Company sought from the Supreme Court of the District of Columbia a writ of mandamus to compel the Interstate Commerce Commission to vacate its order dismissing, and to forthwith consider and pass upon the merits of, petitions filed by said carriers, whereby they asked to be relieved of certain obligations under an agreement with other railroads covering the construction, maintenance, operation, use and management of the Kansas City station and freight terminals at Kansas City, Missouri, and Kansas City, Kansas. (R. 1.) The judgment of the Supreme Court of the District dismissing said petition was entered June 23, 1933. (R. 194.) Petitioners noted an appeal in open court on the same day. (R. 194.) On May 7, 1934, the Court of Appeals of the District affirmed the action of the lower court. (R. 199.) On July 28, 1934, petitioners filed petition for writ of certiorari under Section 240 (a) of the Judicial Code, as amended, and reenacted by the Act of February 13, 1925 (c. 229, 34 Stat. 936, 938) and said petition was granted by this Court October 8, 1934. (R. 215.)

QUESTIONS PRESENTED

1. Whether the Commission's action dismissing the petitioners' intervening petitions was a denial

of jurisdiction or a decision in exercise of quasi-judicial judgment and discretion, as to which mandamus was not an appropriate remedy.

2. Whether mandamus, whose chief function is to compel performance of a ministerial act unequivocally prescribed, may be asked for to review reasonable determinations of the Commission and to direct different determinations not free from doubt.

3. Whether the Commission correctly construed the law in its application to the case made?

STATUTES INVOLVED

The pertinent provisions of the applicable law, the Interstate Commerce Act, U. S. Code, Title 49, c. 1, are as follows:

> Section 1 (15): Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as

may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people upon such terms of compensation as between the carriers as they may agree upon, or in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

Section 3 (1): That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 3 (3): All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

Section 3 (4): If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, in-

cluding main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Section 15a (2): In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Com-

mission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

Section 15a (2), as amended by Transportation Act, 1933: In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

STATEMENT OF THE CASE

Proceedings before the Commission

The proceeding before the Commission, known as Docket No. 15682, *Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Com-*

pany, 104 I. C. C. 203, arose out of the construction of the Kansas City Union Station and other terminal facilities in Kansas City, Missouri, and Kansas City, Kansas.

Prior to 1906, ten railroads serving Kansas City had used the so-called "union depot." The two petitioners here had used the Kansas City Southern's station, the Chicago Great Western being a tenant. The union depot was inadequate and there was a public demand for better facilities. As a result, in 1906, the ten lines organized the Kansas City Terminal Railway Company as a common carrier railroad with an authorized capitalization of 30 million, later increased to 50 million, dollars. Its directorate is composed of a representative of each of the proprietary lines. (R. 76, 104 I. C. C. 208.)

On June 12, 1909, an agreement was entered into by and between the Kansas City Terminal Railway Company, the ten lines, and the Illinois Trust and Savings Bank, as trustee. This agreement was supplemented January 24, 1910, by the inclusion of petitioners, Kansas City Southern and the Chicago Great Western, on equal terms with the original proprietary lines. These two agreements are known as the operating agreement. (Petitioner's Ex. No. 1, R. 14–59; R. 77, 104 I. C. C. 209.)

The operating agreement, the term of which is 200 years, is a mutual engagement covering the construction, maintenance, operation, use and management of the terminals, switching and other

services to be rendered the proprietaries. It may be modified only with the assent of the Terminal Company and each of the proprietary companies and the additional assent of the trustee. (R. 85, 104 I. C. C. 215.)

It provides that one-twelfth of the interest accruing on the Terminal Company's outstanding bonds of $50,000,000, and of the taxes and other governmental charges payable by the Terminal Company, and at maturity one-twelfth of the principal of the bonds, shall be assumed and paid over by each of the proprietaries. Maintenance and operating expenses, including overhead and other general outlays, are accounted for and assessed against each line, by zones used and by calendar months, in the proportion which its use bears to the total use by it and the other lines of the respective zones. Switching services performed by the Terminal Company are at tariff rates, and such special services as are performed by it at approximately cost. Net revenues derived by the Terminal Company from concessions or other uses of the terminal facilities or property are credited monthly to the carriers not in default and in the respective proportions of their contributions.

There are further provisions that termination or suspension of any of the rights of a constituent carrier shall not affect the obligation to make the payment required, and others relating to action in case of default, etc. (R. 85, 86, 87, 104 I. C. C. 215, 216.)

Coincident with the execution of the operating agreement a stock-trust agreement was executed between the Terminal Company and the ten, now twelve, proprietary lines, and the Pioneer Trust Company of Kansas City. It provided for transfer of the shares of the Terminal Company's stock and of such further shares as should be offered to and subscribed for by those lines from time to time to the trust company, in trust for the purpose of carrying out the provisions of the operating agreement and as security for their performance, with provisions against acquisitions of such stock by outside interests. (R. 77, 104 I. C. C. 209.)

The work of construction and unification of the passenger and freight terminals in accordance with plans ultimately adopted was prosecuted and resulted in the opening for business of the new union passenger station November 1, 1914, and the making ready for use and operation the joint terminal facilities. (R. 77, 104 I. C. C. 209.) While the outlay contemplated when the project was initiated was $25,000,000, the ultimate cost was practically twice that amount. (R. 87, 89, 104 I. C. C. 217.)

The Missouri, Kansas & Texas *Railway* Company, one of the proprietary companies, party to the agreements just described, went into receivership and most of its railway lines were purchased at a judicial sale by the Missouri-Kansas-Texas *Railroad* Company. Pursuant to order of the re-

ceivership court, the purchaser was given the privilege of electing as to whether it would or would not become one of the proprietary companies as its predecessor had been. It elected not to do so and initiated proceedings before the Commission (out of which this litigation arises) by filing on March 10, 1924, a petition seeking an order under the authority of paragraph (4) of Section 3 of the Act, according to petitioner the right to use designated portions of the union passenger station and the freight terminals of the Kansas City Terminal Railway Company, at Kansas City, Missouri-Kansas. It alleged that the terms imposed upon petitioner for its use of the terminals were unjust, inequitable and burdensome in that by the operating agreement each of the proprietary lines parties to said agreement is required to pay one-twelfth of the interest and of the taxes, without regard to the extent of the use of the terminal by each such company; that as a small user of the terminal facilities, its payment for interest and taxes is out of proportion to its use. (R. 71, 104 I. C. C. 204.)

All the other users of the terminal filed petitions in intervention. Five of these, known as the larger users, opposed the relief sought; the others, small users, in which group petitioners belong, sought the same relief that the Missouri-Kansas-Texas sought, and also urged that to grant the relief to the Missouri-Kansas-Texas alone would aggravate

the situation and unlawfully discriminate against the other users. (Exs. 3 and 4, R. 61–69, also R. 74, 104 I. C. C. 206, 207.)

Hearings were had upon the issues raised by the petitioner, respondent and the interveners. A large volume of testimony was taken, including the reception by the Commission of evidence on behalf of petitioners. Subsequently, the case was orally argued before the Commission and submitted for determination. Thereafter, the Commission made and issued its report and order, dated November 10, 1925 (Petition, Ex. No. 5, R. 69–119), wherein, after a very full statement of the facts, and after setting forth the respective contentions of the parties, including the interveners, it took up consideration of the applicability to the case of paragraph (4) of Section 3 of the Interstate Commerce Act, upon which the Missouri-Kansas-Texas Railroad Company, and the other small users, including the petitioners here, based their right to relief at its hands.

Paragraph (4) of Section 3 authorizes the Commission, if found to be in the public interest and not prejudicial to the owning carrier of terminal facilities, to require the use of the terminal by another carrier or other carriers, on terms to be agreed upon between the parties, and, in case of failure to agree, the Commission is authorized to fix a just compensation on principles controlling in condemnation proceedings. If the owning carrier

is then not satisfied, it is given the right to sue in court for damages sustained because of its compliance with the order or for just compensation for the use, or both.

Concerning this statute and its applicability to the situation presented, the Commission said (R. 94, 95, Rept. pp. 222–223):

> The paragraph above quoted empowers us, when found to be in the public interest and practicable, without impairing the ability of a carrier "owning or entitled to the enjoyment of terminal facilities" to handle its own business, to require the use of the facilities by "another carrier" or "other carriers" upon terms and for compensation to be agreed upon or to be fixed as provided. The primary power to be exercised is to "require the use" of the terminals, which power the further power to fix the compensation in appropriate circumstances merely supplements. The requirement is to be laid upon a carrier then "owning or entitled to the enjoyment" of the facilities and for the benefit of "another carrier" or "other carriers"; in other words, to be laid upon a carrier owning or by lease or otherwise entitled to present enjoyment and for the benefit of a carrier or carriers not so owning or entitled.
>
> Obviously, the interveners are not in the latter situation. They have been and are in all respects entitled to the past, present, and future enjoyment of the terminals in ques-

tion, and have enjoyed and now enjoy them in their own right as virtual coproprietors. They and the other proprietary lines have the equitable title to the property and franchises in undivided equal shares, and through their corporate instrument, the respondent, the facilities are controlled and operated. Not only so, those interveners, equally with the other proprietaries, have been and still are parties to the operating agreement, and to accord them the desired relief would necessarily involve to that extent what would amount to a revision or reformation of that agreement. They do not seek an abrogation of the entire agreement as wholly invalid and not to be binding upon them in any part, but merely, however stated, that certain of its provisions be in effect rewritten. A contention by the Alton that it would not in terms require a revision of the agreement, but merely a revision of the charges now imposed upon that line, would seem to express a distinction without a difference. Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed. The power and authority thus invoked are not conferred by the quoted paragraph.

The report then took up the question of the applicability of Section 15a of the Act, insofar as it provides that the Commission shall initiate, modify or adjust reasonable rates so that the carriers as

a whole or in groups will under honest, efficient, and economical management earn a net railway operating income equal to a fair return on the aggregate value of their railway property used in transportation service.[1] Answering a contention that under that provision the Commission need only find that the operating agreement is so burdensome as to result in inefficient management, to cause misapplication by the railways involved of funds created for an entirely different purpose, and generally to impair their ability to furnish adequate service, it was said (R. 96, Rept. p. 224):

> * * * However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. What the provision requires or authorizes us to do is to fix remunerative reasonable rates in circumstances which embrace honest, efficient, and economical management as a condition or limitation. We should have the information in that respect which will aid an effective exercise of our duty and authority, but we are not commanded to insure or empowered to enforce such management, responsibility for which at all times rests upon the carriers. Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful

[1] Section 15a (2) was amended by Transportation Act, 1933. Both the old and new paragraphs are set out under the chapter, "Statutes Involved", *supra*, p. 3.

in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act.

It then passed upon the asserted violation caused by the agreement of paragraphs (1) and (3) of Section 3 of the Act and said (R. 96–97, Rept. p. 224):

> * * * Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges,

> they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

The conclusion, so far as petitioners are concerned, was (R. 97, Rept. p. 225):

> An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee, and Alton.

Such an order was entered on November 10, 1925. (R. 119).

The case upon the petition of the Missouri-Kansas-Texas was continued pending the outcome of litigation testing the question of whether it was bound by the terms of the operating agreement.[2] This was subsequently decided in favor of the Missouri-Kansas-Texas' contention that it was not so bound and thereafter the case was heard by the Commission June 1, 1933, on the question of just and reasonable compensation for its use of the terminal, the Commission having held that as to that railroad it had jurisdiction under Section 3 (4) provided it was not bound by the agreement.

In 1931, the petitioners filed petitions for a rehearing of the Commission's order dismissing their

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[2] Pending final disposition of the proceedings, the Commission issued an emergency order pursuant to paragraph (15) of Section 1 of the Act, permitting the Missouri-Kansas-Texas to use the terminals, under the terms of the operating agreement; payments thereunder not to be the final measure of compensation (R. 72).

petitions in intervention, but these were denied by the Commission on June 1, 1931. (Petition, par. (13), R. 10.)

Proceedings in Court

The petition for mandamus filed in the Supreme Court of the District on May 31, 1933, proceeds on the theory that the action of the Commission in dismissing petitioners' intervening petitions was erroneous in law and constituted a denial of a jurisdiction conferred upon it by the Interstate Commerce Act; that in refusing to exercise this asserted jurisdiction, the Commission acted arbitrarily and contrary to law and denied to petitioners their lawful rights. (Petition, pars. (16) (17), (18), R. 12.)

Petitions to intervene as parties respondent were filed by the Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and the Kansas City Terminal Railway Company (R. 163, 182); they mere allowed (R. 165, 183) and their answers were filed (R. 165, 184). At the hearing the Missouri Pacific Railroad Company was admitted as a party to the intervention filed on behalf of the Santa Fe and others. (R. 195.)

The case was heard upon the petition, answer of the Commission, the answers of the interveners, and petitioners' demurrer to said answers. The

Court overruled the demurrer, and the petitioners electing to stand upon their demurrer, judgment was entered dismissing the petition. (R. 194.) An appeal was noted, (R. 194) and, on May 7, 1934, the Court of Appeals of the District affirmed the judgment of the lower court. (R. 199.) Petition for writ of certiorari was filed in this court on July 28, 1934 (R. 215) and the writ was allowed by order dated October 8, 1934. (R. 215.)

SUMMARY OF THE ARGUMENT

1. That, in the proceedings before it, the Commission entertained the intervening petitions of petitioners and others, proceeded to hear the evidence, exhaustively considered the facts, as applicable to the law, is manifest from its report. The denial of the relief sought was just as much an exercise of jurisdiction as the awarding of the relief would have been. There was no denial by the Commission that it had jurisdiction to require the use of the terminals of one carrier by another, under Section 3 (4), or to correct a discrimination under Section 3 (1) and (3) of the Interstate Commerce Act. As to Section 3 (4), the Commission decided that petitioners, who were already established in the use of the terminal properties, were not such carriers as could apply for an order that they be permitted such use. This determination was one of judgment and discretion, not reviewable by mandamus. *General Investment Co.* v. *N. Y. Cent. R. R.* 271 U. S.

228, 230–231; *Butte, Anaconda & Pac. Ry. Co.* v. *United States*, 290 U. S. 127, 136. As to section 3 (1), the Commission, assuming for the purposes of the case that that paragraph's prohibitions against unjust discriminations were broad enough to embrace, as between the parties, a joint terminal agreement voluntarily entered into, decided that the provisions in said agreement, which were complained of, namely, the provisions for distribution among the carriers of the essentially capital charges (bond interest and taxes) on the basis of the proprietary carriers' equitable titles or interests in the terminal properties instead of on the basis of the use made of the properties, was not shown to cause undue preference or prejudice or unjust discrimination.

This determination while looking to the beneficial titles or interests in the properties held by the proprietary companies through the medium of their instrument, the terminal company, was, nevertheless a matter of judgment and discretion; and, if in any way making erroneous application of principles of law, which is not believed to be the case, such error is not reviewable by writ of mandamus. *United States ex rel. Campbell* v. *Int. Com. Comm.*, 289 U. S. 385, 393, 394. As to the requirements of Section 3 (3) for the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding and delivery of passengers and property without

discrimination in rates, fares and charges: the Commission's determination was that the charges under the agreement for bond interest and taxes on the terminal properties, they being "essentially capital charges, have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3)." This determination, similarly as the others, was one of judgment and discretion. *Wilbur* v. *United States,* 281 U. S. 206, and decisions above cited.

2. The relief sought by the mandamus action, namely, that petitioners who are already established in the use of said terminals as virtually coproprietors thereof under a joint terminal agreement, are entitled to an order requiring and, in effect condemning, such use on their behalf and fixing compensation therefor, or to an order declaring that their contract obligations in respect of "capital charges", as now based on their equitable interests in the terminals, unjustly discriminate against them, and fixing, in lieu thereof, the just and reasonable obligations, raises questions which are anything but free from doubt. The chief function of the writ of mandamus is to compel a ministerial act so plainly prescribed as to be a positive command, and it should not be used for purposes of review of questions which, as advanced by petitioners seeking such a writ, are of exceeding doubt, at least as resolvable in favor of their contentions. *Int.*

Com. Com. v. *N. Y., New Haven & Hartford R. R.*, 287 U. S. 178; *Wilbur* v. *United States*, 281 U. S. 206.

3. The Commission's construction of the law in its application to the facts was not only reasonable and not arbitrary, but on the contrary correct. The provisions of law involved clearly did not entitle petitioners to the relief sought before the Commission.

ARGUMENT

I

Mandamus is not an appropriate remedy in this case

In *Wilbur* v. *United States*, 281 U. S. 206, this court said, at pages 218–219:

> Mandamus is employed to compel the performance when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.

In *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, this Court said:

> The principles of law relating to the remedy by *mandamus* are well settled.
>
> It lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion.
>
> It lies, also, where the exercise of judgment and discretion are involved and the

officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal.

It is applicable only in these two classes of cases. It cannot be made to perform the functions of a writ of error.

(Id. 533–534.)

The Commission's report shows a painstaking and thorough study and consideration of all the factors in the case. It goes fully into all the pertinent facts, discusses the status and situation of the petitioners and the other parties, details the conditions which gave rise to the new union station and the facilities connected therewith, the plan which was adopted to consummate the project, the various agreements voluntarily entered into by the railroads to insure the project, and takes up the various contentions and views of the interested parties.

The conclusion of the Commission was that a case warranting relief under the applicable law had not been made out by the intervening small users. Hence, these petitions were dismissed.

This action was firstly predicated upon the holding that the small users did not come within the purview of paragraph (4) of Section 3, which empowers the Commission under certain conditions to compel a carrier to allow the use of its terminal facilities to another carrier, since they were already using the terminal facilities under voluntary agreements while the statute contemplated

a case where use is not had but is desired and compulsion is necessary to force the unwilling terminal owner to allow use, (Report, R. 94, 95, 104 I. C. C. 222, 223). This holding was plainly on the merits being to the effect that petitioners were not such carriers as could invoke the provisions of said paragraph. In short it was a holding that petitioners did not have the requisite standing to seek the relief—a determination on the merits in exercise of jurisdiction. *Butte, A. & P. Ry.* v. *United States,* 290 U. S. 127, 142. *Abilene & Southern Ry.* v. *Interstate Commerce Commission,* 8 F. (2d) 901. Secondly, the Commission's action was predicated on the fact that there was no showing of undue prejudice or preference in violation of paragraph (1) of Section 3 caused by the provision in the agreement for distribution equally among the carriers of charges for bond interest and taxes on the terminal properties on the basis of the carriers' equal equitable titles or interests in the properties instead of on the use made thereof, because those charges are strictly capital charges.

And as to paragraph (3) of Section 3, the Commission said: "Also, as essentially capital charges, they have no relation, direct or indirect, to the ininterchange of traffic between the several lines within the contemplation of paragraph (3)". In reaching these determinations, it will be seen that the Commission looked to the equitable titles or interests in the properties as held by the proprie-

tary carriers through their instrument, the Terminal Company, but that fact does not render the determinations any the less matters of judgment, opinion and discretion; and, if it in any way erroneously applied principles of law, which we submit was not the case, mandamus does not lie to correct the error. *Wilbur* v. *United States,* 281 U. S. 206; *Campbell* v. *Int. Com. Comm.,* 289 U. S. 385, 393. In *General Investment Co.* v. *New York Central R. Co.,* 271 U. S. 228, 230, this Court said:

> * * * By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits (*The Fair* v. *Kohler Die Co.,* 228 U. S. 22, 25; *Geneva Furniture Co.* v. *Karpen,* 238 U. S. 254, 258) as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain, either because it will not injure him or because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter. Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction. *Illinois Central R. R. Co.* v. *Adams,* 180 U. S. 28, 34; *Venner* v. *Great Northern Ry. Co.,* 209 U. S. 24, 34. If it be resolved

against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction.

Even if it had committed an error by misconstruction of the applicable law, it did not transcend its jurisdiction because jurisdiction does not depend upon a correct decision. The distinction between jurisdiction and merits is plain. Jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue. *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305, 306. By jurisdiction is meant the power to entertain a case, consider the merits and render a binding decision; by merits is meant the various elements which enter into or qualify the right to the relief sought. There may be jurisdiction and yet an absence of merits. *General Investment Co.* v. *N. Y. Central R. R., supra.*

The recent decision in *Butte, Anaconda & Pacific Ry. Co.* v. *United States,* 290 U. S. 127, is precisely in point. There the United States sued the railroad to recover money paid to it under a certificate issued by the Commission under Section 204 of the Transportation Act, 1920, which provided for payment to carrier engaged in general transportation operating under its own management during the period of Federal control and sustaining a deficit in operating income as defined in the section. It was asserted that the certificate had been issued under an erroneous construction by the Commision, later changed, of the meaning of

"deficit", as used in the statute, and hence that the Commission had no authority to issue the certificate or the officials of the Treasury to make payment to the railway company.

Speaking of that contention the court said it had no occasion to determine which one of the Commission's interpretations of the word "deficit" was the correct one, because it was of opinion that the Government could not recover, even if the Commission had erred. It then said (p. 136):

> The decision was on the merits. The case is no different than it would have been, if the Commission had erred in any other ruling on a matter of law; or in a finding strictly of fact; or in some finding as to maintenance, depreciation or value—determinations called findings of fact but which rest largely in opinion. In making those decisions the Commission would necessarily act in a *quasi*-judicial capacity. If it misconstrued the term "deficit", it committed an error; but it did not transcend its jurisdiction. * * *

Then, after referring to numerous questions which the Commission would have to determine in interpreting the provisions of Section 204, the Court said (p. 141):

> While Sec. 204 granted a bounty, it conferred a right, and constituted the Commission a *quasi*-judicial tribunal to adjudicate claims thereunder. Thus it was called upon to pronounce a formal judgment on rights

asserted. A decision adverse to the carrier on any one of the suggested questions of construction might compel dismissal of the claim; thus relieving the Commission of the necessity of enquiring whether a deficit had been suffered. But it does not follow that such a decision would determine an issue of jurisdiction. Under this legislation, whether a claimant seeking "relief has the requisite standing is a question going to the merits and its determination is an exercise of jurisdiction." Compare *General Investment Co.* v. *New York Central R. Co.*, 271 U. S. 228, 230. Though it were charged that the Commission erred in so dismissing the claim, the carrier could not by mandamus compel it to proceed with the enquiry. * * *.

II

Mandamus is not available to compel determination in a particular way of questions involving the exercise of judgment and discretion, especially where the determination sought is most doubtful

Furthermore, an additional factor showing that mandamus could not be used to control the Commission's exercise of quasi-judicial judgment is that there was nothing arbitrary either in its determination that petitioners, already established in the use of the terminal, were not such carriers as could apply under Section 3 (4) for an order requiring that they be permitted that use, or in its determination that the distribution between the

carriers, of obligations for bond interest and taxes on the property, based on their equitable interests in the property itself is not

> shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3). (Report, R. 97.)

This latter determination, whether as involving law or fact, was one of judgment. As said in *Butte, Anaconda & Pacific Ry.* v. *United States,* 290 U. S. 127, 136, which has been already discussed:

> The decision was on the merits. The case is no different than it would have been, if the Commission had erred in any other ruling on a matter of law; or in a finding strictly of fact; or in some finding as to maintenance, depreciation or value—determinations called findings of fact but which rest largely in opinion. In making those decisions the Commission would necessarily act in a *quasi*-judicial capacity.

The relief sought by petitioners would compel the Commission to hold that they, although already established in the use of said terminal, had the requisite standing to invoke the provisions of Section 3 (4), and would compel the Commission to

reach a different judgment and determination than that arrived at under Section 3 (1) and (3). The questions involved can hardly be said to have been free from doubt, at least as resolvable in favor of petitioners' contentions, which fact gives added support to the lower court's opinion that mandamus was not a proper remedy.

In *Wilbur* v. *United States,* 281 U. S. 206, this Court said at pages 218-219:

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
>
> The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the

> duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

The above decision was, among others, referred to in *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.*, 287 U. S. 178, in which this Court pointed out that the duty there sought to be compelled by mandamus, namely, to value certain trackage rights under Section 19a of the Act, "has been imposed upon the Commission too vaguely and obscurely to be enforced by a mandamus." At pages 203–204, the opinion reads:

> * * * For the purpose of this case, it is enough to hold, as we do, that the duty of specific valuation, if it exists, has been imposed upon the Commission too vaguely and obscurely to be enforced by a mandamus. *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636; *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206. One cannot rise from a study of the statute in the setting of its history and of the administrative practice under it and hold at the end an assured belief that the Commission has been commanded by the Congress to do the act omitted. Where a duty is not plainly prescribed, but is to be gathered by doubtful inference from statutes of uncertain meaning, "it is regarded as involving

the character of judgment or discretion," (*Wilbur* v. *United States ex rel. Kadrie, supra*), and mandamus is thereby excluded. The case at hand differs in essentials from *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commn.*, 252 U. S. 178, where a specific, unequivocal command, removed after the decision by an amendment of the statute, was laid upon the Commission to value a particular thing, and the Commission ignored the command to the extent of refusing to hear any evidence whatever. The ruling in that suit has been explained in later cases, and confined to its peculiar facts. *Interstate Commerce Commission* v. *Waste Merchants Association*, 260 U. S. 32, 35; *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 311.

In *Hall* v. *Payne*, 254 U. S. 343, the Court speaking of the Act there in question and the Secretary of the Interior's construction of it, said (p. 348):

> * * * The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus. * * *.

In the recent case of *Interstate Commerce Commission* v. *Campbell*, 289 U. S. 385, this Court said at page 393:

> * * * Errors of law in the discharge of a function essentially judicial are not sub-

> ject to be corrected through the writ of mandamus any more than errors of fact. * * *.

The opinion in the present case of the Court of Appeals for the District is very clear in its discussion of this phase. The Court said:

> * * * But appellants tell us that the statute is broad enough and that, in the view they are entitled to take, the refusal of the Commission to grant the relief is not grounded on a misinterpretation of the statute, but is in every respect a denial of jurisdiction. * * *. But we think the appellants' position in this respect is grounded upon a mistaken theory. It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask. The Commission is an administrative body and can exercise only the powers delegated to it by Congress, but in the application and interpretation of the powers conferred it exercises judgment and discretion, and it was clearly in the exercise of these that it used the language in the quoted sentences above. If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion. And we may remark in passing that to justify the Commission in the exercise of such authority as is asked, the right to do so should be expressed in clear and certain lan-

> guage. * * *. The case is, of course, different if the contract either then or subsequently violates a specific law of the United States. Cf. *L. & N. R. R.* v. *Mottley*, 219 U. S. 467. In cases in which it does not, it may well be that only the most pressing public necessity would justify the Congress in delegating to an administrative body jurisdiction to destroy a valid contract and substitute another of its own making, and the Commission would not be justified in assuming Congress had done so except when the authority was clear, for the inviolability of contracts is a cardinal principle of our business and social life. (R. 207–209.)

Under the authorities it is certain that there was no warrant for the issuance of the writ applied for by petitioners.

III

The Commission correctly construed the law in its application to the facts

We might well rest the case upon the points already discussed, but we think it well to consider the provisions of the statute to show the reasonableness and the correctness of the Commission's construction of them.

First, as to paragraph (4) of Section 3, set out in full, *supra*, p. 5.

The very language of the paragraph shows that the power which the statute imposed on the Commission was a compulsive power upon an unwilling

terminal owner to allow use of the terminal by another carrier, who desired but could not otherwise obtain use of the facilities.

The provisions for compensation and the method which are prescribed for fixing it all indicate that the allowance of the use by the owning carrier is involuntary. This is emphasized by the assimilation of the procedure in condemnation cases to the determination of compensation when the parties cannot agree on that matter, or are dissatisfied with the Commission's determination of the amount of compensation.

Plainly the proceeding contemplated is adversary in character and does not relate to a voluntary arrangement between the carriers.

The petitioners are not in such situation as to be entitled to the relief which they sought of the Commission. They are already using the terminal facilities, they have a contract or agreement voluntarily entered into years ago by which their right to occupy and use the terminal facilities was secured and by which they assumed obligations in consideration for the right so secured. Further, they, as pointed out by the Commission, are in the status of proprietors of the facilities, along with the ten other "proprietary companies." Thus, upon the facts, they did not bring themselves within Section 3 (4).

The Commission has construed this paragraph as applying to involuntary allowance of use. In

Hastings Commercial Club v. *Chicago, M. & St. P. Ry. Co.*, 69 I. C. C. 489 (decided July 10, 1922), it so held, (p. 493).

In *Long Island R. R. Co. Trackage*, 162 I. C. C. 218, the Long Island and the Pennsylvania had entered into an agreement for trackage rights into and use of the Pennsylvania's station at New York City by the Long Island. A certificate of public convenience and necessity for such operation, under Section 1 (18) of the Interstate Commerce Act was applied for and also an order of the Commission, under Section 3 (4), requiring the use of the tracks and facilities upon the terms already agreed to by the parties. The Commission dismissed the application under Section 3 (4), saying (p. 220):

> * * * As to section 3 (4), which provides for the compulsory opening of one carrier's terminal facilities to another carrier when the public interest requires such use, there is nothing in the situation here presented which brings it within the terms of that paragraph. By voluntary arrangements between the parties the Long Island has been using the tunnel, yard, and terminal facilities provided for it by the Pennsylvania in New York since September 8, 1910. There is no suggestion that the Pennsylvania intends to discontinue this privilege. The question of compensation is indeed at issue, but contrary to the applicants' understanding of the force of this fact, associated as it is with the close corporate relationship between

> the companies, the applicability of section 3 (4) does not appear. Accordingly, the fixing of compensation as therein provided on the principle controlling compensation in condemnation proceedings, may be disregarded. That part of the application which is under section 3 (4) will therefore be dismissed. * * *.

The Commission's order was sustained in *Transit Commission* v. *United States,* 289 U. S. 121, although without discussion of this phase of the case.

The legislative history of the bill which became the Transportation Act also shows that Congress was providing for *compulsory* sharing of terminal facilities. House Report No. 456, 66th Congress, 1st Session; House Report No. 650, 66th Congress, 2nd Session.

No claim is now made that the Commission's authority to accord the relief petitioners seek comes within the purview of Section 15a (2), reliance being placed entirely on Section 3, paragraphs (1), (3) and (4). What the Commission said concerning the nonapplicability of Section 15a clearly disposes of that point. (R. 94–97, 104 I. C. C. at pp. 223, 224.)

The basis for the claim of discrimination, in support of which paragraphs (1) and (3) of Section 3 of the Act were brought forth, is that by the terms of the mutual agreement, the small users of the terminal are required to sustain the same burden as the

large users so far as the capital charges are concerned, one-twelfth of the interest on the bonds of the Terminal Company, and of the taxes and of the principal of the bonds; that that is undue prejudice and unjust discrimination within those provisions of the law because their use of the terminal facilities is less than the use thereof by other lines and that, if the Commission should hold that the Missouri-Kansas-Texas Railroad was entitled to an order under paragraph (4) of Section 3 and should fix a lesser compensation to be paid by said railroad for the use of the terminals than it was paying under the terms of the agreement, the difference would have to be assumed in equal shares by the remaining eleven proprietary companies, thereby aggravating the unjust discrimination. (R. 11, 12.)

Paragraphs (1) and (3) of the section are set forth, p. 5, *supra,* in full, and are summarized in what the Commission, in considering this claim of discrimination, said (R. 96, 104 I. C. C. at p. 224) as follows:

> Paragraphs (1) and (3) of section 3 are put forward as vitiating the operating agreement in so far as it provides for the equal division of interest and taxes. Paragraph (1) prohibits any undue prejudice or preference as between particular persons, companies, firms, corporations, or localities, or particular descriptions of traffic, in any respect whatsoever, chargeable to any common carrier or carriers subject to the act. Para-

graph (3) commands the maintenance of appropriate facilities for the interchange of traffic between carriers, and for the receipt, forwarding and delivery of passengers and property, without discriminations in rates, fares, and charges or in the distribution of unrouted traffic between their connections. Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of paragraph (3).

It would seem that the above conclusions were indisputable. Through the terminal company, equally owned and controlled by them, each of the railroads hold equal equitable titles or interests in said terminal company's properties and, accordingly, each pays an equal share of the "capital charges." As to the user charges, the rate of charge is the same, the carriers paying in proportion to the use made of the facilities. No claim is made of discrimination in respect of the user charges.

It is also clear that the facts of the case do not show any violation of paragraph (3) of Section 3. There is no basis for the claim that there is any failure to furnish or afford "reasonable, proper, and equal facilities for the interchange of traffic," etc. Indeed, the operating agreement requires and provides that the use of such facilities as are available shall be furnished without discrimination. (See Article I, Sections 3, 4, and 5 of the Operating Agreement.)

And in Article III, Section 1, it is provided that the Terminal Company "shall establish rules and regulations governing the operation of trains within and upon the Terminal Facilities *and the use* and *enjoyment* thereof in all other respects; provided, always, that such rules and regulations shall be fair and equitable and shall apply *equally* and *without discrimination* to all the Railway

Companies using the Terminal Facilities * * *." (Italics supplied.) (R. 36.)

Concerning the charges for maintenance and operating expenses, those charges are, as aforesaid, based on the respective uses made by the carriers of the terminal properties. It is the essentially capital charges, namely, those for taxes, interest and principal on bonds, equally distributed among the carriers on the basis of their equal equitable interests in the properties, with which we are concerned here.

Assume that the arrangement between the carriers had been for direct ownership, or ownership through a trustee, of the properties, each having an undivided one-twelfth legal, or equitable, title therein. Assume, too, that the charges for maintenance and operating expenses were, as here, based on the respective uses made by the carriers of the station and freight terminals. Whether paying for their said titles or interests in the properties out of the proceeds from sales of their stock or bonds or out of surplus, in one way or another each carrier would be meeting its share of the capital charges. In such case, however, it cannot be assumed that each carrier's share of the capital charges would be equal, for those carriers, having stronger credit, might have been able to secure the money at lower rate of interest or through sale of stock or other securities, not carrying fixed obligations as to interest or principal payments. By

contrast, in the present case it seems likely that the better credit of the stronger carriers materially aided to reduce "capital charges" which the weaker carriers might otherwise have had to meet to acquire and maintain their equal beneficial interest in the properties. It is recognized, of course, that carriers of strong credit and carriers of weak credit are not necessarily carriers which make greater and lesser users respectively of the terminal properties; but the above analogy serves as a partial illustration of the elements entering into contract obligations such as here involved.

It may be that it was unwise for certain of the carriers to have acquired an equal interest with the others in the properties. On the other hand, looking to possible increased price of terminal lands, anticipated growth of traffic and equality of competitive opportunity for such growth, it may have been wise policy. Doubtless there are many individual carriers, the cost of whose terminals, passenger and freight, are in excess of needs, but which were acquired and are being maintained for competitive reasons of one kind or another.

Petitioners urge in effect that the Commission's report shows that if it had the authority it would have undertaken to grant the relief asked. The statement to which reference is made reads as follows (R. 97):

> In reaching the foregoing conclusions we nevertheless think that this case strongly suggests the advisability of a reexamination

> by the respective participating carriers of terminal arrangements which have been developed through past decades, including division of capital charges and *adjustment of property interests.* The subject is obviously of such importance to the public, including the railroads, that a reappraisal should be voluntarily undertaken in the light of present conditions. (Italics supplied.)

We have underscored the words "adjustment of property interests" in order to make plain that the Commission, even in suggesting to the carriers voluntary revision of terminal arrangements, was not recommending changes in obligations for capital charges without corresponding change in property interests.

The order which is sought to be set aside was entered November 10, 1925, nearly eight years before this suit was filed; the petitions for rehearing were not filed until 1931, more than two years prior to the filing of the suit.

We call attention to the fact that a considerable amount of the bonds of the Kansas City Terminal Company was sold after the order of the Commission of November 10, 1925. (R. 240.) It may fairly be inferred that they were purchased on the faith of the Commission's decision and order and that the bondholders would be prejudiced if the constituent carriers were to have the privilege of withdrawing from their obligations in respect of the "capital charges", and prejudice would like-

wise result to the Kansas City Terminal Company. Furthermore, as petitioners show at page 8 of their brief, the Commission had held, under Section 3 (4), the Missouri-Kansas-Texas entitled to use of the terminal facilities and had continued the case for the purpose of determining the compensation which should be paid for that use. Such hearing and decision has been had. (198 I. C. C. 4.) In that report, the Commission repudiated the "user" bases for apportioning interest and taxes and holds that the unit or numerical basis is the fair basis. The Commission said:

> Petitioner contends that the numerical basis is grossly inequitable, and that there is nothing in the language of the statute or the decisions of this Commission or the courts which prevents measuring the compensation by the extent of the use. When analyzed, its position amounts to this, that respondent must hold its property in readiness at all times for the joint and equal use of petitioner, but that petitioner should be permitted to use the various zones if and when it may choose to do so, or not at all if it should so choose as to any particular zone, and to pay only for such use as it may actually make of the property. * * *.
>
> The user basis as a method for determining the portion of the interest charge to be imposed upon petitioner finds no support in the principles governing compensation in condemnation cases, and in our opinion does

not afford a just and reasonable basis. We conclude that the numerical basis in the circumstances of this case affords the just and reasonable method to be applied.

(Id. 9–11.)

CONCLUSION

It is respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia, sustaining the action of the trial court in dismissing the petition for a writ of mandamus, was correct and should be affirmed.

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No. 234.

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONERS,

VS.

INTERSTATE COMMERCE COMMISSION ET AL., RESPONDENTS.

BRIEF FOR RESPONDENT, KANSAS CITY TERMINAL RAILWAY COMPANY.

SAMUEL W. SAWYER,
JOHN H. LATHROP,
Counsel for Respondent, Kansas City Terminal Railway Company.

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U. S. C., Tit. 49, Sec. 1 (21) 47
U. S. C., Tit. 49, Sec. 1 (18) to (20) 53, 55
U. S. C., Tit. 49, Secs. 3 (1), 3 (3), 3 (4) 3, 25, 39

LEGISLATIVE HISTORY

Congressional Record, Vol. 17, 49th Congress, First Session, April 14, 1886, p. 3472 ..... 29, 30
Senate Committee Report No. 46, 49th Congress, First Session, p. 215 29

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 234.

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONERS,

VS.

INTERSTATE COMMERCE COMMISSION ET AL., RESPONDENTS.

BRIEF FOR RESPONDENT, KANSAS CITY TERMINAL RAILWAY COMPANY.

THE OPINION BELOW.

No written opinion was rendered by the Supreme Court of the District of Columbia. The opinion of the Court of Appeals is now reported as *United States ex rel. Chicago Great Western Railroad Company* v. *Interstate Commerce Commission*, 71 F. (2d) 336, and is set forth in the record in full at page 199.

STATEMENT OF THE CASE.

This case comes to this Court on writ of certiorari to the Court of Appeals of the District of Columbia, which affirmed a judgment of the Supreme Court of the District of Columbia, denying the petitioners a writ of mandamus to require the Interstate Commerce Commission to vacate its order of dismissal and to take jurisdiction of and decide upon the merits the issues claimed to be raised by certain intervening petitions filed by the petitioners in a proceeding before the Interstate Commerce Commission instituted by Missouri-Kansas-Texas Railroad company (hereinafter called "M-K-T") against Kansas City Terminal Railway Company (hereinafter called "Terminal Company").

The Proceeding Before the Commission.

The M-K-T, a new company, which had purchased the railroad of the old Missouri, Kansas and Texas Railway Company at foreclosure sale and had disaffirmed the contract (called the "Operating Agreement") (R. 71), by which the old company had the right to use the Terminal Company's facilities (R. 14), sought by its complaint an order of the Commission requiring the Terminal Company to permit the M-K-T to use certain parts of the Terminal Company's facilities and to fix the compensation to be paid for such use under Paragraph (4) of Section 3 of the Interstate Commerce Act as amended by the Transportation Act of 1920. (R. 71.) It is unnecessary to quote Paragraph (4) in full at this point. It is enough that it authorizes the Commission

to require the use of facilities of one carrier by another under certain circumstances, and authorizes the Commission, in the event of a failure of the carriers to agree, to fix the compensation to be paid "on the principle controlling compensation in condemnation proceedings." (U. S. Code, Title 49, Sec. 3 (4).)

In the proceeding filed by the M-K-T (which, by virtue of its disaffirmance of the Operating Agreement, was not a party to the Operating Agreement) all of the parties to the Operating Agreement, including the petitioners, filed intervening petitions. Some supported the Terminal Company and the Operating Agreement. Others were similar to the Kansas City Southern and Chicago Great Western's petitions. Still others were somewhat indecisive. (R. 74, 75.) The intervening petitions of the petitioners will be found at pages 61 to 69 of the record. They are not identical, either in allegations or prayer. The Kansas City Southern's intervention, which is the more elaborate of the two, alleges that the Operating Agreement, under which the railroads entering Kansas City use and control the facilities of the Terminal Company, is unjust and inequitable through an unfair distribution of interest and taxes, that discrimination against it and other small users of the facilities results, and that, if the M-K-T is permitted to use the facilities for compensation less than that paid by the proprietary companies, the alleged discrimination will be accentuated, and prays "and if the Commission resolves the issue of jurisdiction prayed by the application of petitioner and the answer of the Terminal Company in favor of such jurisdiction and assumes jurisdiction in the premises, that

the Commission enter upon an investigation of the entire situation and enter such an order herein as will fairly, reasonably and without discrimination place the use and the terms thereof of the terminal facilities of the Terminal Company by the various parties enjoying such use on a fair, just and equitable basis among such parties, in accordance with and in proportion to the use thereof made by the various parties." (R. 69.) The Chicago Great Western's intervening petition alleges discrimination if "this Commission does take jurisdiction of the controversy [the M-K-T's] and does grant to complainant [M-K-T] the right to use the facilities of defendant upon the payment of any sum or sums less than those which it would be required to pay under the terms of said operating agreements." Its prayer is—"your petitioner further says, that if complainant is granted the right to use the facilities of defendant, the compensation therefor to be fixed by this Commission in any amount less than the amounts which complainant would be required to pay under said operating agreements, then that your petitioner is entitled to the same right and that any order entered herein granting said right to complainant should also grant similar relief to your petitioner." (R. 62.)

Though couched in general language, the substance of the Kansas City Southern's prayer was that if the Commission took jurisdiction of the M-K-T controversy, the terms of the Operating Agreement be entirely made over by the Commission. The Chicago Great Western on the other hand asked for relief from the full payments

prescribed in the Operating Agreement, only in the event the M-K-T obtained the right to use the facilities for compensation less than the amounts required to be paid by the Operating Agreement.

In this Court both petitioners appear to claim that they do not ask to have the contract rewritten, but that they want the Commission to exercise the police power upon only one of the terms of the contract—leaving the contract otherwise undisturbed. (Petitioners' Brief 43, 51, 52.)

The Commission, after having heard extensive testimony offered by the petitioners, along with the testimony offered by the M-K-T and other interveners, dismissed these intervening petitions, as well as the intervening petitions of several other intervening railroad companies. (R. 119.) The order of dismissal does not state the reason for the dismissal, but the report of the Commission (which is set out in full in the record beginning at page 69) discusses the grounds and evinces the thorough consideration given by the Commission to the interveners' evidence, briefs and arguments.

The order of dismissal is dated November 10, 1925.

The Commission, at that time, entered no final order on the original complaint of the M-K-T, but, as indicated in the report, awaited the result of the litigation in which this Court answered certain questions certified by the Circuit Court of Appeals for the Eighth Circuit (*Kansas City Terminal Railway Company et al.* v. *Central Union Trust Company of New York et al.*, 271 U. S. 445), and in which the Circuit Court of Appeals for the Eighth

Circuit, pursuant to this Court's answers, rendered a final decision on July 7, 1928. (*Kansas City Terminal Railway Company et al.* v. *Central Union Trust Company of New York et al.*, 28 F. (2d) 177.) After the opinion of the Circuit Court of Appeals was handed down, the Commission proceeded with the hearings on the M-K-T's complaint in order to determine the just compensation to be paid by the M-K-T "on the principle controlling compensation in condemnation proceedings," and finally as of November 13, 1933, handed down its report and final orders fixing the compensation. (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company*, 198 I. C. C. 4.) In this report it repudiates the so-called user basis for apportioning among joint users having equal rights of use the return to be paid the owner, and holds that the unit or numerical basis is the just and reasonable basis. The Commission says:

> "Both petitioner and respondent concede that just and reasonable compensation must include a reasonable return upon the fair value of those zones of the terminal which petitioner has acquired the right to use. Two methods of computing that return are urged upon us. Petitioner urges the user basis, by which is meant that petitioner should pay upon basis of the relation which its use of the terminal bears to the use by all the using carriers. This has been averaging somewhere in the neighborhood of 5 per cent. Respondent urges the numerical basis, that is, adjustment in relation to the number of users of the terminal regardless of the extent of the individual user by those lines. As there are 11 other users, petitioner's proportion under this basis would be one-twelfth.

"Petitioner contends that the numerical basis is grossly inequitable, and that there is nothing in the language of the statute or the decisions of this Commission or the courts which prevents measuring the compensation by the extent of the use. When analyzed, its position amounts to this, that respondent must hold its property in readiness at all times for the joint and equal use of petitioner, but that petitioner should be permitted to use the various zones if and when it may choose to do so, or not at all if it should so choose as to any particular zone, and to pay only for such use as it may actually make of the property." (l. c. 9.)

"The user basis as a method for determining the portion of the interest charge to be imposed upon petitioner finds no support in the principles governing compensation in condemnation cases, and in our opinion does not afford a just and reasonable basis. We conclude that the numerical basis in the circumstances of this case affords the just and reasonable method to be applied." (l. c. 11.)

Subsequent Events.

Following this decision, as appears from the statement contained in the brief for petitioners, the M-K-T requested and received the assent of the Terminal Company and the railroad companies, parties to the Operating Agreement and Stock Trust Agreement, to become a party to the Operating Agreement and Stock Trust Agreement as the successor of the old Missouri, Kansas and Texas Railway Company by the execution of supplemental Operating and Stock Trust Agreements, which will entitle it to use the facilities of the Terminal Company with all the privileges and subject to all of the obligations of the other railroad companies, parties to

the Operating and Stock Trust Agreements. Pursuant to this arrangement, the M-K-T has filed with the Interstate Commerce Commission (Finance Docket No. 10571) an application for authority, under Sections 1 (18), (19), (20), 5 (4), and 20a of the Interstate Commerce Act, to use the facilities of the Terminal Company upon the terms of the Operating Agreement, to assume the obligations thereby imposed upon the proprietary companies and to acquire stock of the Terminal Company, and has also filed in the original case brought before the Commission by the M-K-T against the Terminal Company (I. C. C. Docket No. 15682) an application for relief from compliance with the Commission's order of November 13, 1933, such relief to be effective upon the final execution and delivery of such supplemental Operating and Stock Trust Agreements.

Since petitioners have brought to the Court's attention these undisputed facts occurring since the filing of the original petition in mandamus, we think that there are several other occurrences of a similar nature which should also be mentioned, in order that the Court, so far as practicable, may have the present situation clearly before it.

On April 8, 1933 (before the final decision of the Commission in the M-K-T case), the receivers of the Wabash Railway Company notified the Terminal Company that, pursuant to the orders of the court of their appointment, giving them the right to affirm or disaffirm executory contracts of the company, they elected to disaffirm the Operating Agreement. Shortly thereafter, in May, 1933,

they filed an application before the Interstate Commerce Commission, similar to the application filed by the M-K-T in 1924, asking for the right to use certain of the facilities and for the determination of just compensation under Paragraph (4) of Section 3 of the Interstate Commerce Act. (*Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company,* v. *Kansas City Terminal Railway Company,* I. C. C. Docket No. 25973.) On June 1, 1934, after the decision of the Interstate Commerce Commission in the M-K-T case, the receivers of Wabash Railway Company proposed to the Terminal Company that they be permitted to withdraw their disaffirmance of the Operating Agreement and dismiss the proceeding before the Interstate Commerce Commission. On June 19, 1934, the board of directors of the Terminal Company, by resolution, accepted this proposal. On July 9, 1934, the receivers applied to the Interstate Commerce Commission for an order dismissing the proceeding filed by them (I. C. C. Docket No. 25973 above referred to), and on August 21, 1934, the Commission entered an order dismissing the complaint in pursuance of the application.

On June 28, 1934, the trustees for the St. Louis-San Francisco Railroad Company (appointed by the District Court of the United States for the Eastern District of Missouri in Proceedings for the Reorganization of a Railroad under the Amendments to the Bankruptcy Act) filed with that court, in pursuance of a previous order giving them the right to elect to adopt or reject executory contracts, their election to adopt the Operating Agreement.

On July 1, 1934, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, which, under a foreclosure de-

cree of the District Court of the United States for the Northern District of Illinois, had purchased the properties of Chicago, Milwaukee and St. Paul Railway Company (which decree, with subsequent extensions, gave the purchasing company until July 1, 1934, to elect to reject the agreements), voluntarily permitted the time to elapse within which it might have disaffirmed the Operating Agreement and Stock Trust Agreement, and thereby became bound by and a party to them.

The interveners, whose intervening petitions were dismissed by the Commission (R. 119), other than the petitioners, have done nothing further respecting their interventions since their dismissal. The petitioners in April and May, 1931, more than five years after their interventions were dismissed, filed before the Commission their petitions for rehearing. These were overruled on June 1, 1931. They did nothing further until May 31, 1933, more than seven years after their interventions were dismissed and shortly before the final report in the original M-K-T case, when they filed their petition for a writ of mandamus in the Supreme Court of the District of Columbia.

Organization of Terminal Company and Relations of Parties.

A brief account of the circumstances leading to and following the organization of the Terminal Company and the execution of the Operating Agreement and the Stock Trust Agreement will be helpful in understanding the issues.

In 1906, and for a long time prior thereto, the principal trunk lines of railroads entering Kansas City (except the petitioners) used a union depot located in the west bottoms of Kansas City near the Missouri-Kansas boundary line. The petitioners occupied a station owned by the Kansas City Southern. The old union depot was inadequate, and there had been an active and growing public demand for the construction of better facilities. This demand was reinforced by the desire and need of the carriers for more adequate facilities, not only for the accommodation of passenger traffic, but also for the interchange, transfer and handling of freight. Accordingly, negotiations were begun by the carriers among themselves and later by the carriers with the City of Kansas City. (R. 75, 76.)

The problem before the roads was not a simple one. Three different locations for the proposed new Union Station were suggested, one adjacent to the site of the then existing station, another in the east bottoms in the north end of Kansas City, and the third, the location finally selected. (R. 89.) Each of these locations had its advantages and disadvantages from a general operating standpoint. Each, likewise, had its advantages and disadvantages to particular carriers. For example, the Burlington, and to a lesser extent, the other railroads using its bridge across the Missouri River, decidedly preferred the site adjacent to the then existing station because of its location almost immediately at the end of the bridge and its convenience to the yards and facilities of the Burlington. On the other hand, the railroads entering the city from the east, and having trackage and

yards in the east bottoms, much preferred the north end site. The railroads entering the city from the south, and some of those entering from the east, and from the west along the Kaw River Valley, preferred the site finally selected. In order to compensate those roads, which would otherwise be put to a disadvantage by the site finally selected, and in order to induce them to become parties to the Operating Agreement, it was necessary to construct expensive facilities which would tend to overcome the disadvantages. For example, to take care of the Burlington and the other roads using the Burlington Bridge, it was arranged that a double track line should be constructed from a point near the Burlington Bridge around the west bluffs of Kansas City (and on a different level from the freight tracks covering the west bottoms in that immediate vicinity), which tracks would be devoted exclusively, except in emergencies, to the passenger traffic of these roads, thus bringing the station to the bridge as nearly as that could be accomplished. (R. 37.) In the case of several of the railroads entering the city from the west and northwest, including the Chicago Great Western, one of the petitioners in this case, it was necessary to construct an elevated line, costing several million dollars, in order that the passenger trains of these railroads might be brought into the station without the interruption which would necessarily result from their crossing the numerous freight tracks located in the lowlands in the westerly part of Kansas City and across the Kaw River in the State of Kansas. (R. 79, 80.) There were similar adjustments in connection with the construction of freight

facilities. Common yards for the care, repair and cleaning of passenger coaches and for the care, repair and cleaning of locomotives were constructed (R. 79), a number of common freight houses and team yards were constructed at advantageous points in the city (R. 80), and each of the railroads was given the absolute right (subject to the reasonable rules and regulations of the Terminal Company) to run its passenger and freight trains over each and every part of the facilities, as and when it chose to do so, for the full period of two hundred years. (R. 16, 17, 18, 77, 186, 188.)

In addition to advantages of location which the different railroads gave up in agreeing upon one or the other location, there were also tangible and financial sacrifices made. For example, while the present facilities of the Terminal Company constitute a belt around the entire city (with various branches leading in various directions), the main tracks are along the south side of the city, principally in what is known as the O. K. Creek Valley. (R. 79, 82A.) These tracks extend westwardly from the present Union Station across the Kaw River into the State of Kansas, and eastwardly a distance of about 6.5 miles to the eastern limits of Kansas City, Missouri. (R. 79.) The right of way acquired from the Kansas City Belt Railway Company was widened and additional land was acquired for the Union Station. The entire stock of the Kansas City Belt Railway Company, which owned this line, was in turn owned by the Atchison, Topeka and Santa Fe Railway Company, the Chicago, Milwaukee and St. Paul Railway Company and the St. Louis & San Francisco Rail-

way Company. These roads surrendered their stock to the common enterprise at book value and thus contributed, for the benefit of all the constituent lines, at a price of approximately $3,500,000, properties claimed to be worth about $9,000,000. (R. 89.) Other transactions of a similar character, but smaller in amount involved, could be mentioned. (R. 90.) By these transactions, various of the railroads conveyed to the Terminal Company properties, which they were at the time using individually and which could not have been taken from them for common use otherwise than by the power of eminent domain (as now exemplified by Paragraph (4) of Section 3 of the Interstate Commerce Act).

The different railroads were likewise affected differently in respect to the operating expenses of the Terminal Company by the location of the Union Station and other specific facilities. The closer a facility happened to be to the point of entrance of the tracks of a particular railroad into the city, the less trackage that railroad would have to use in reaching that facility and, consequently, the less proportion of operating expenses it would have to pay on the car mileage basis adopted in the Operating Agreement for the distribution of operating expenses. (R. 89.) The roads were establishing a common enterprise, were retaining an equal ownership in that enterprise, and each undertook an equal part of the investment and capital costs involved in the development of that enterprise. (R. 20, 21.)

As a result, the ten lines which used and owned the old Union Depot and owned the capital stock of the old

Union Depot Company caused the Terminal Company to be organized. (R. 76.) Each subscribed and paid for an aliquot part of its presently issued capital stock. Negotiations with the city culminated in the enactment of an ordinance (approved June 7, 1909) which provided for the vacation of certain streets and alleys, granted rights of way and generally covered the various municipal details necessary in the construction of a great terminal in a populous and growing city. (R. 76.) Among other things, the ordinance contained detailed and drastic provisions for preserving equality of opportunity to use the terminals by the various railroad companies, and provisions for preserving the right of other railroads to obtain the use of the facilities. (R. 83, 84.) At about this time the Operating Agreement, dated as of June 12, 1909, was entered into. (R. 14.) It provided for the construction of the new Union Station and all of the other facilities; for the joint and equal right in each of the signatory companies to run its trains over each and every part of the facilities for two hundred years (R. 17, 18); for the payment by each of the railway companies of an aliquot part of the interest on the Terminal Company's bonds, taxes and assessments on the Terminal Company's property and the principal of the Terminal Company's bonds at maturity (R. 20); for payment of the operating expenses of the Union Passenger Station by the respective companies in proportion to the number of cars and engines using the Union Station facilities (R. 25); for the payment by the respective companies of the operating

expenses of other portions of the terminal facilities on the basis of car mileage (R. 26); for the division equally among the proprietary companies of the net revenues of the Terminal Company obtained from rentals, concessions, switching, etc. (R. 26, 27); for the exclusion of defaulting companies from the privileges of the facilities (R. 34) (in which event the remaining companies would be obligated thereafter to pay the defaulting companies' portion of the interest and taxes (R. 21)); and for the pledging of the Operating Agreement with the trustee under the Terminal Company's mortgage, as further security for the bonds issued under the mortgage. (R. 16, 22, 39.) Early in 1910, these petitioners (the Kansas City Southern, upon its insistent demand, and the Chicago Great Western, by invitation (R. 89)), by supplemental agreement, became parties to the Operating Agreement, in every respect acquiring the same rights and assuming the same obligations as the original parties. (R. 47-50.)

Concurrently with the execution of the Operating Agreement in 1909, a Stock Trust Agreement was executed, by which the stock of the proprietary companies (which had been subscribed for by the ten railroad companies, and an equal amount of which was held by each) was deposited with a trustee in order to insure the equality of control contemplated by the Operating Agreement, not only for the benefit of the railway companies, but for the benefit of the holders of the $50,000,000 of bonds of the Terminal Company, to secure which the Operating Agreement was pledged. (R. 77, 120.) In

1910 the petitioners subscribed and paid for amounts of stock equal to those subscribed and paid for by each of the original parties to the Stock Trust Agreement, and, by Supplemental Stock Trust Agreement, became parties to the Stock Trust Agreement and subjected their stock to the Stock Trust Agreement in like manner as the original parties thereto. (R. 137-140.)

Thus all of the twelve trunk line railroads entering Kansas City, some of them theretofore the owners of properties which they dedicated to the common enterprise, became, in practical effect, the joint owners (through stock ownership and the control provided in the Operating Agreement) of the terminal facilities, which were constructed for the express purpose of accommodating them, and which consist, not only of a union passenger station, but of tracks running for several miles in every direction and belting the city, over which the trains of the proprietary companies can be brought to the station and to other parts of the facilities, freight tracks connecting all of the trunk lines with each other, freight stations, freight yards, a bridge across the Kaw River, an elevated line running through Kansas City, Kansas, and other comprehensive facilities, constituting a completely integrated and unified terminal. (R. 78-80.)

The Missouri, Kansas and Texas Railway Company (predecessor of the M-K-T), as well as the petitioners, was a party to these agreements. (R. 14, 120.) Some years after, the Missouri, Kansas and Texas Railway Company went into the hands of a receiver and its property was sold under a decree of foreclosure. The M-K-T was the purchaser at the sale as a result of a plan of

reorganization. (R. 71.) It succeeded in securing an adjudication by the courts that the obligations of the Operating Agreement and the Stock Trust Agreement did not run with the property and, therefore, would not automatically bind the purchaser at the foreclosure sale. (*Kansas City Terminal Railway Company et al.* v. *Central Union Trust Company of New York et al.*, 294 Fed. 32.) In accordance with the foreclosure decree so permitting (which was affirmed in the case above referred to), it elected to disaffirm the Operating Agreement and the Stock Trust Agreement (R. 71) and, upon making such election, brought the proceeding above referred to before the Interstate Commerce Commission to acquire the right of use and to have the compensation for such use ascertained under Paragraph (4) of Section 3 of the Interstate Commerce Act. This was the proceeding into which the petitioners, by their interventions, sought to inject themselves.

Pleadings in This Mandamus Case.

The petition for mandamus filed by the petitioners in the Supreme Court of the District of Columbia (R. 1-13) was answered by the respondents. (R. 157, 165, 184, 195.) The answer of this respondent appears at pages 184-192 of the record. By the answers the respondents admitted certain allegations of the petition and denied others. This respondent's answer specifically pointed out and denied a large number of conclusions asserted in the petition. It also appropriately raised the constitutional questions hereafter set out in this brief.

The petitioners demurred and the demurrers were overruled by the court. The petitioners elected to stand upon their demurrers, and, in consequence, the petition was dismissed by the court. (R. 194.)

The case, therefore, stands, not upon the allegations of the petition, but upon the allegations of the answers (including such parts of the petition as are admitted by all of the answers) and the stipulation as to certain formal facts made at the hearing. (R. 195.)

(Throughout the brief italics used in quotations are ours unless otherwise noted.)

SUMMARY OF THE ARGUMENT.

1. The Interstate Commerce Commission is not an omnipotent sovereign, but an administrative body possessing only the powers conferred by Congress. No section of the Interstate Commerce Act, either expressly or by necessary implication, confers upon the Commission any power to set aside the Operating Agreement and Stock Trust Agreement between the Terminal Company and its twelve proprietary companies, or to order the companies, parties to it, to pay to the Terminal Company, on account of the interest and taxes payable by the Terminal Company, any greater or less sums than those provided in the Operating Agreement. The division of interest and taxes among the proprietary companies is the result of a settlement of property rights as between the railroad companies, of which the organization of the Terminal Company was a part, is strictly proprietary in its nature, and has no relation to rates, fares and charges for transportation. It is beyond the power of the Commission to disturb.

2. The discrimination provisions of the Interstate Commerce Act bear only upon carriers *as such*. They have no bearing upon the strictly proprietary acts or status of railroad companies. Paragraph (1) of Section 3 applies only to shippers. Paragraph (3) of Section 3 applies to railroad companies, only in the respects specifically mentioned in it, and, so far as amounts col-

lected by one carrier from another carrier are concerned, only to collections or exactions of rates, fares and charges.

3. Paragraph (4) of Section 3 is obviously inapplicable, because petitioners are already entitled to the use of the facilities, and, therefore, are not of the class for which this paragraph provides a remedy.

4. The fact that other sections of the Act give extensive powers over the carriers in the respects named in such sections does not further extend those extensive powers to the control of carriers in respects not named in the Act.

5. To construe the Act in the manner claimed by petitioners would raise grave constitutional questions. This is a sufficient reason for avoiding such construction, even if a contrary construction were not plainly demanded by the language of the Act. In fact, the construction claimed would render the Act so applied unconstitutional.

6. Even though it be admitted, for the sake of the argument, that the proper construction of the Act is doubtful, mandamus will not lie. It is the duty of the Commission as an administrative agency of the government to construe the Act as to the scope and application of its powers. The Commission has not denied its jurisdiction to remove discriminations. Its holding that it has no power by virtue of these provisions to disturb the pro-

prietary relationships of the railroads under contracts of the nature of those involved is not a denial of jurisdiction, but an exercise of jurisdiction. Furthermore, the Commission, notwithstanding its opinion that it had no power to disturb these contracts, considered the contentions of the petitioners and held that, on the facts as disclosed in the record, no discrimination within the intent and meaning of the Interstate Commerce Act had been practiced against the petitioners. This was a finding upon the merits which would preclude mandamus, even if mandamus would otherwise lie.

7. The petitioners' interventions before the Commission unduly broadened the issues, their present contentions present a moot case, and the petitioners should be barred by laches.

ARGUMENT.

I.

The Commission Has No Power under the Interstate Commerce Act or Any Other Act of Congress to Grant the Relief Asked by Petitioners' Intervening Petitions.

If the Commission had no power to grant the relief prayed, then obviously it was right in dismissing the intervening petitions.

In considering the power of the Commission in this respect, certain fundamentals must be borne in mind.

(1) The Interstate Commerce Commission is an administrative agency of the government. (*United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 282 U. S. 311, 324; *Interstate Commerce Commission* v. *Humboldt Steamship Company*, 224 U. S. 474, 484; *W. A. Hover & Co.* v. *Denver, etc., R. R. Co.*, 17 F. (2d) 881, 884 (C. C. A. 8).) It can exercise only such powers as are given by statute, either expressly or by clear implication. (*Chesapeake & Potomac Telephone Company* v. *Manning*, 186 U. S. 238, 248; *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52, 67, 68, 69, 70, 71; *Interstate Commerce Commission* v. *Oregon-Washington River Navigation Company*, 288 U. S. 14, 35.)

(2) The petitioners, by their interventions in the M-K-T case, have, in effect, asked this administrative agency of the government to set aside a contract, by which twelve railroad corporations undertook to settle

their proprietary rights in the Terminal Company's property and in its use for two hundred years, and on the faith and security of which the bonds of the Terminal Company were issued and sold to the public. (See especially Section 2 of Article I, Section 1 of Article II, and all of Article V of the Operating Agreement. (R. 21, 25, 49.)) They are not asking the Commission to regulate any activity of the Terminal Company as a common carrier, but they are asking that the terms of this contract, upon which its very existence depends, without which its first mortgage bonds would be of little value, and by which the property rights of the various companies in its facilities are established, shall be utterly disregarded.

(3) The destruction of these property and contract rights, if not plainly in violation of the Fifth Amendment, certainly raises grave constitutional questions.

(4) The authority to destroy these property and contract rights must be found in the language of the Interstate Commerce Act, or some other act of Congress. The power must be conferred in express language or by necessary implication. Vague generalities are not sufficient. It cannot be presumed that Congress intended to defy the Constitution. Only the plainest language, expressing the intent of Congress, should be construed to delegate such an authority to the Commission. (*United States* v. *Delaware & Hudson Company*, 213 U. S. 366, 407; *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217; *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 306; *Lewellyn* v. *Frick*, 268 U. S. 238,

251; *Interstate Commerce Commission* v. *Oregon-Washington R. Co.* 288 U. S. 14, 40.)

It, therefore, behooves us to examine the provisions of the Interstate Commerce Act, which are supposed to grant this extraordinary power.

In petitioners' brief they claim that their interventions were justified by Paragraphs (1), (3) and (4) of Section 3 (49 U. S. C., Secs. 3 (1), 3 (3), 3 (4)) and "other sections of the Interstate Commerce Act." While petitioners, at pages 28, 29 and 33 of their brief, quote the language of Paragraphs (1) and (3) and the pertinent part of Paragraph (4), in their argument they disregard the language. They prefer to deal in vague generalities regarding preferences and discriminations. The exact language of these paragraphs is essential to clear thinking.

PARAGRAPHS (1) AND (3) OF SECTION 3.

Paragraph (1) of Section 3 (U. S. C., Title 49, § 3 (1)) is as follows:

> "(1) That it shall be unlawful for any *common carrier* subject to the provisions of this act to make or give any undue or unreasonable *preference* or advantage *to any particular person,* company, firm, corporation, or locality, or any particular description of *traffic,* in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Paragraph (3) of Section 3 (U. S. C., Title 49, § 3 (3)) is as follows:

> "(3) All *carriers,* engaged in the transportation of passengers or property, subject to the provi-

> sions of this act, shall, according to their respective powers, afford all reasonable, proper, and *equal facilities for the interchange of traffic* between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and *shall not discriminate in their rates, fares and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.*"

When read together, the intent of these provisions is plain.

Paragraph (1) obviously applies only to shippers. Paragraph (3) applies only to other carriers. Paragraph (1) has no application to other carriers. Paragraph (3) has no application to shippers. Both paragraphs have been in the Act since its passage in 1887 in their present form, except that the Transportation Act of 1920 eliminated the last clause of Paragraph (3) as originally written, reading as follows:

> "but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." (24 St. L. 380.)

and added the new Paragraph (4) as well as the present language in Paragraph (3) prohibiting discrimination in the distribution of traffic not specifically routed by the shipper. The evident purpose of eliminating the former language was to remove the possible inconsistency with the new Paragraph (4), which was added to the Act at the same time.

That Paragraph (1) was intended to protect shippers, not other carriers, is plain from the decisions of the courts and of the Commission.

In *Texas & Pacific Railway Company* v. *United States*, 289 U. S. 627, this Court says:

> "The purpose of Sections 2, 3, and 4 (49 U. S. C. A., Secs. 2-4), as exhibited by committee reports and explained by those in charge of the bill in Congress, was to prevent unjust discrimination resulting from existing practices. Similar commodities were, without reason or excuse, carried at different rates. Shippers similarly situated were put on unequal terms. Producers and consumers at points of origin and destination were prejudiced by unequal treatment in the matter of rates or service. Obviously, localities of origin or destination might also be prejudiced by undue discrimination. One of the most prevalent and reprehensible practices at which the act was aimed was the charging of a less or an equal rate for a longer haul upon the same line or route. *The act was passed for the protection of those who pay or bear the rates. The standards it establishes are transportation standards, not criteria of general welfare.*" (l. c. 638.)

In *Oregon Short-Line Railway Co.* v. *Northern Pacific Railroad Company*, 61 Fed. 158 (C. C. A. 9), Mr. Justice McKenna, then circuit judge, said, with reference to this paragraph:

> "The first part of this section prohibits preference to persons, firms, or corporations, and to localities and traffics, and prohibits the subjecting of either to prejudice or disadvantage. The evidence shows that there was no preference given any person, firm, or corporation in the sense of this section, and no traffic or locality is complaining,

unless the complaint of appellant is such. But we do not think it is competent for a railroad company to appropriate the grievance of a traffic or locality under Section 3, and complain on account of it." (l. c. 159, 160.)

In *Delaware, etc., Railroad Company* v. *Kutter,* 147 Fed. 51 (C. C. A. 2), the court says:

"The wrong prohibited by the section is a discrimination between shippers." (l. c. 63.)

In *Oklahoma-Arkansas Telephone Company* v. *Southwestern Bell Telephone Company,* 183 I. C. C. 771, the Interstate Commerce Commission in its report says:

"The legislative history of this paragraph of Section 3 appears to support the view that discrimination between shippers was the only thing aimed at. If this were not so, the provisions of Section 3 (3), which specifically prohibit discrimination between carriers of passengers or property, would seem to be superfluous. We are constrained to hold, therefore, that a situation of prejudice or preference between common carriers is not comprehended by the provisions of Section 3 (1)." (l. c. 774.)

As the Commission says in the case last cited, the legislative history of the Interstate Commerce Act confirms this interpretation.

Senator Cullom, chairman of the committee having charge of the original bill, said, with reference to Section 3, in presenting and explaining the bill:

"The first paragraph prohibits the giving of any due or unreasonable preference to any particular

person or locality or to any particular description of traffic in any respect whatever." (Congressional Record, Vol. 17, 49th Congress, First Session, April 14, 1886, p. 3472.)

In the Senate Committee Report (Report No. 46, 49th Congress, First Session, page 215, the following was said:

"The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation systems of the United States as now conducted is unjust discrimination between persons, places, commodities or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations."

In *Discontinuance of Inland Stations in New York City,* 173 I. C. C. 727, the Commission says with reference to Paragraph (1):

"There is no merit to this contention. The wrong prohibited by Section 3 is a discrimination between shippers." (l. c. 738.)

Paragraph (3) on the other hand, by its terms, applies to carriers. It applies to carriers, however, only in the specific relations described.

Senator Cullom, in his presentation and explanation of the bill above referred to, had the following to say about Paragraph (3) of Section 3:

"Its purpose is to require railroads to furnish connecting roads, all reasonable and proper facilities for the interchange of traffic that may be necessary for the convenience of the public, and to prevent one road or a combination of roads 'from freez-

ing out' connecting lines by refusing to accept from it or deliver traffic to it upon any terms, as has been done." (Congressional Record, Vol. 17, 49th Congress, First Session, April 14, 1886, p. 3472.)

Paragraph (3) consists of two mandates and two prohibitions.

The first mandate is that all carriers shall afford to others reasonable, proper and equal facilities for the interchange of traffic between their respective lines. There is no pretense that this mandate has been violated by this respondent. There has been no complaint whatever in regard to this respondent's facilities for the interchange of traffic, or the manner in which it affords them to other carriers.

The second mandate is that carriers shall afford reasonable, proper and equal facilities for the receiving, forwarding and delivering of passengers or property. There has likewise been no complaint in this respect.

Coming to the two prohibitions, and considering the last one first, it is that the carriers shall not "unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper." There is no contention that this respondent has ever prejudiced any connecting line in the respect named.

The other prohibition is that carriers "shall not discriminate in their rates, fares and charges between such connecting lines." It is this clause only upon which petitioners must hang their case. They must contend, and apparently do, that the phrase "charges between such connecting lines" includes the payments under the Operating Agreement for interest and taxes

made by the proprietary companies by reason of their ownership and control of the Terminal Company and its facilities.

The language on its face shows that it has no reference to capital investments or interest and taxes upon investments. Such obligations, even if they were "charges," are not "between such connecting lines." They are payments made on account of a vested proprietary right in physical facilities and their use. "Connecting lines" means connecting carriers *as carriers.* The proprietary railroad corporations are connecting lines only in the respect that it is necessary for them to connect in order to get the use of the physical facilities which they own.

Furthermore, the words "rates, fares and charges," even divorced from their context, mean, in the ordinary acceptation of the English language, sums collected or imposed for transportation. If there were any doubt otherwise, the context makes it clear that this is its meaning. The clause immediately preceding relates to "the receiving, forwarding and delivering of passengers or property to and from their several lines," and the clause following clearly refers to rates, fares and charges for "the receiving, forwarding and delivering of passengers or property to and from their several lines."

Any possible doubt is dissipated by reading the rest of the Interstate Commerce Act. In every case where the words "rates, fares and charges" are used, they mean rates, fares and charges directly connected with transportation. On the principle of *ejusdem ge-*

neris, the word "charges" means charges of the same character as the rates and fares previously referred to, and whenever it is used separately, it is used in this sense. In other places throughout the act, sometimes the three words "rates, fares and charges" are used together. Sometimes the words are used separately. When used separately, the word "rates" will be found to refer always (except in Section 15 (a) where it is expressly provided that the word shall be deemed the equivalent of the words "rates, fares and charges") to rates for the carriage of freight; the word "fares," to rates for the carriage of passengers; and the word "charges," either to rates for the carriage of freight, rates for the carriage of passengers and incidental exactions combined, or sometimes to incidental exactions directly related to transportation, such as icing charges, storage charges, demurrage charges, etc. When used in the latter sense, it is usually accompanied by a word descriptive of the character of the exactions, such as "icing," "storage," "demurrage," etc.

The following are some of the sections where one or more of these phrases occur: Section 1 (4), (5) and (6); Section 2; Section 3 (2) and (3); Section 4 (1) and (2); Section 6 (1), (2), (3), (7) and (11); Section 10 (1), (2) and (3); Section 13 (3) and (4); Section 15 (1), (3), (6) and (13); Section 15 (a).

Wherever rights in or the use of physical facilities are involved, the word "terms" or the word "compensation" is used, *e. g.*, in Paragraph (15) of Section 1, relating to emergency requirements for the joint use of terminals, the phrase is: "And upon such *terms* as be-

tween the carriers as they may agree upon or, in the event of their disagreement, as the Commission may after subsequent hearing, find to be just and reasonable." In Paragraph (4) of Section 3, the phrase is: "And for such *compensation* as the carriers affected may agree upon or, in the event of a failure to agree, as the Commission may fix as just and reasonable."

That Section 3 applies only to railroads in their capacities as common carriers, and not to railroads in the exercise of their proprietary rights, is made plain by a series of decisions of this Court contrasting the obligations of railroads as common carriers and their rights as private property owners.

A leading case is *Donovan* v. *Pennsylvania Railroad Company*, 199 U. S. 279, where it was held that a railroad company could make an exclusive contract with a bus and transfer company and that it need not extend similar facilities to hack drivers generally because it owed no duty, either at common law or by statute, to such hack drivers. The doctrine of this case is firmly established by the decisions of this Court in *Delaware, Lackawanna & Western R. R. Co.* v. *Town of Morristown*, 276 U. S. 182, and *Black and White Taxicab Company* v. *Brown and Yellow Taxicab Company*, 276 U. S. 518.

See, also, *Express Cases*, 117 U. S. 1 (exclusive contract with express company); *Railroad Company* v. *Pullman Company*, 139 U. S. 79 (contract with sleeping car company); *Santa Fe, Prescott & Phoenix Railway Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177 (trans-

portation of contractor's outfit); *Clough* v. *Grand Trunk Western Ry. Co.*, 155 Fed. 81 (transportation of circus); *Sager* v. *Northern Pacific R. R. Co.*, 166 Fed. 526 (transportation of circus); *Matter of Railroad-Telegraph Contracts*, 12 I. C. C. Rep. 10, 11 (contract with telegraph company); *Merchants Cotton Press & Storage Company* v. *I. C. R. Co.*, 17 I. C. C. 98 (cotton compress service); *Southwestern Produce Distributors* v. *Wabash R. Co.*, 20 I. C. C. 458; *Andrews Brothers Company* v. *Pennsylvania R. Co.*, 38 I. C. C. 165 (auctions at terminal freight house); *Andrews Brothers Company* v. *Pennsylvania R. Co.*, 123 I. C. C. 733; *Williams Thompson Company* v. *A. & W. RR.*, 126 I. C. C. 417 (lease of warehouse); *Uniform System of Accounts*, 171 I. C. C. 557 (coal mines).

In like manner, a railroad company owes no duty to buy railroad equipment from all the manufacturers of railroad equipment, because it has bought from one. It owes no duty to pay Smith a certain price for the coal bought from him because it has already paid that same price to Jones. It owes no duty to sell Brown a worn-out locomotive because it has sold White a worn-out locomotive. The proposition is so obvious that further illustrations would be superfluous.

> "There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act." (*Kansas City So. Ry.* v. *United States*, 282 U. S. 760, l. c. 764.)

Counsel rely upon expressions in opinions of this court to the effect that railroads as well as shippers are

entitled to impartial treatment. Such language, of course, must be read in its context. In no case has the court held that one railroad company owes a duty of impartiality to other railroad companies in its proprietary relationships with them, any more than it has held that a railroad company owes a duty of impartiality to merchants in its proprietary relationships with *them*.

A brief reference to some of the cases cited by petitioners will demonstrate their inapplicability.

In *Pennsylvania Company* v. *United States*, 236 U. S. 351, cited by petitioners, the discrimination was with respect to the specific duties imposed upon the carrier by Paragraph (3) of Section 3.

In *Louisville & Nashville Railroad Company* v. *United States*, 238 U. S. 1, the discrimination was with respect to "a particular description of traffic," which falls expressly within the inhibition of Paragraph (1) of Section 3.

In the *Chicago Junction Case*, 264 U. S. 258, the language quoted by petitioners was used by the court in discussing the question whether the petitioners had the legal interest necessary to entitle them to challenge the order. The case did not involve Section 3 at all. It originated with an application by the New York Central under Paragraph (18) of Section 1 and Paragraph (2) of Section 5 for authority to acquire the capital stock of the Chicago River and Indiana Railroad (which would lease the Chicago Junction Railway), and to extend its line by the use of such facilities. The Commission

granted the application. The District Court, without opinion, dismissed the bill brought by the Baltimore & Ohio and other lines for an injunction. In this Court it was asserted that the plaintiffs had not the legal interest to entitle them to maintain a suit questioning the validity of the other. This Court held that the plaintiffs, as competitors of the New York Central and users of the terminal railroads involved, and as parties in the original case before the Commission, had a special interest, and, therefore, could maintain the suit. The decree of the District Court was reversed, because this court held that the bill alleged sufficient facts regarding the insufficiency of the evidence before the Commission to render the order of the Commission void. The case was, therefore, sent back to the District Court for a hearing on the merits.

Chicago, I. & L. Railway Co. v. *United States,* 270 U. S. 287, is a typical case of discrimination under Paragraph (3) of Section 3. The Lake Erie refused to establish with an electric railroad through routes or joint rates for interchange switching charges. We quote from this Court's discussion of the effect of the Interstate Commerce Commission's order:

> "* * * The order directed the steam railroads to remove the unjust discrimination which the Commission found was being practiced against an electric railroad, which also entered that city, by refusal to switch its interstate carload traffic and to make arrangements with it for reciprocal switching." (l. c. 290.)

Transit Commission v. *United States*, 289 U. S. 121, did not involve Section 3 at all. It arose under Paragraph (18) of Section 1. The Commission did not exercise jurisdiction to prevent any alleged discrimination. No discrimination was even claimed. It exercised jurisdiction under the express authority of Paragraph (18) of Section 1, which precludes a carrier from extending its line without first securing the authority of the Commission. The Commission held that the extension of a line, by making a trackage contract instead of acquiring title, came within the Act. The Commission, therefore, was interested in the terms upon which the carrier would acquire such trackage rights, just as it would be interested in the price which the carrier might pay to acquire title to a proposed extension.

The language of Paragraph (4) demonstrates that the general language of Paragraphs (1) and (3) is not to be given any such strained interpretation as appellants seek to give it, for Congress in Paragraph (4) has specifically recognized that equality in compensation and terms for the use of facilities is not necessary, but that the carrier owning the facilities may agree on the terms with the other carrier or carriers involved. In fact the Commission's jurisdiction to fix the compensation is made expressly contingent on the carriers not being able to agree. If they do agree, the Commission has no power to proceed further, no matter what variance there may be between the compensation paid by the different carriers.

If Paragraph (4) opened the terminals of all carriers to all other carriers at the pleasure of the latter,

there might be some excuse for contending that the anti-discrimination provisions of Paragraphs (1) and (3) applied. But Congress has done no such thing. Paragraph (4) recognizes that no carrier holds itself out as a furnisher of terminal facilities to all the world, but that its facilities are private property which can be taken by its competitors only upon payment of just compensation. It therefore requires, not the payment of rates for a common carrier service, but the payment of just compensation for property taken. And before the owner can be disturbed in any way, it provides that the Commission must find its disturbance to be in the public interest; and, before the Commission can fix the compensation, it provides that the owner and the proposed user must have failed to agree. In other words, Paragraph (4), instead of prohibiting discrimination, affirmatively contemplates differences in treatment. The public interest might call for the use by one carrier but not by another—a difference. The Commission might require the use by two carriers, and the owner might agree as to the compensation with one and not with the other. The Commission then, following the mandate of the statute, might fix the compensation to be paid by the other carrier at a less or greater sum than that agreed to between the owner and the first carrier—again, a difference.

The fact is that Paragraph (4) fixes in plain language the conditions under which the Commission can take jurisdiction and the methods to be followed in fixing the compensation, if jurisdiction is assumed.

These provisions are exclusive, and Paragraphs (1) and (3) have no bearing on them whatever.

It is plain that no authority for the annihilation of the Operating Agreement and of the security for this company's bonds is to be found in Paragraphs (1) and (3) of Section 3.

PARAGRAPH (4) OF SECTION 3.

Petitioners also rely upon Paragraph (4) (U. S. C., Title 49, §3(4)). The pertinent part of Paragraph (4) is as follows:

> "(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of *a carrier owning or entitled to the enjoyment of terminal facilities* to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, *by another carrier* or other carriers, on such terms and for such compensation *as the carriers affected may agree upon,* or, *in the event of a failure to agree, as the Commission may fix as just and reasonable* for the use so required, to be ascertained *on the principle controlling compensation in condemnation proceedings.* Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced." (Italics ours.)

Paragraph (4) was added to the Interstate Commerce Act by the Transportation Act of 1920 (41 Stat. L. 479). The purpose of Congress, as declared in the latter Act (see 41 Stat. L. 488), was to enable the railroads as a whole to furnish adequate transportation service to the public, not to serve the interests of individual car-

riers, nor to provide for arbitration of disputes growing out of contractual relationships between carriers. (See *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563, 585, 589; *New England Divisions Cases*, 261 U. S. 184, 189; *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456, 478.) That Paragraph (4) was intended to cover the field and furnish an exclusive and effective remedy is shown by the elimination at the same time of the following language formerly contained in Paragraph (3), upon which had been built up a large body of judicial decisions establishing the rights of railroad companies to the exclusive use of their own facilities and the lack of power in the Commission to interfere therewith:

> "but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." (24 Stat. L. 380.)

Paragraph (4) requires no interpretation. By its terms, it has no application unless the parties themselves have been unable to agree.

The right to invoke its provisions is extended only to carriers *other* than the carrier owning or entitled to the enjoyment of terminal facilities. A carrier already entitled to the enjoyment of the terminal facilities is thus by direct implication excluded from the category of carriers for whom the enjoyment of the use may be commandeered.

And, even where the use is condemned for the benefit of a carrier not already entitled to its enjoyment, the jurisdiction of the Commission *to fix the compensation*

is, by the express language of the statute, wholly excluded where the carriers agree between themselves. The Commission in such case may require the use, but only "on such terms and for such compensation as the carriers affected may agree upon, *or, in the event of a failure to agree,* as the Commission may fix, etc." The failure to agree is thus an express condition precedent to the exercise by the Commission of the power to fix the compensation.

The power of the Commission to determine the terms and compensation for the use, therefore, is confined to those cases where one of the carriers is not entitled to the use and where the carriers have not been able to agree between themselves, either by prior contract or by agreement after the use has been ordered.

The language of Paragraph (4) is not confined to those cases where a condemnation petition is filed by a carrier. The Commission has the power of initative. It can itself order the use, and then proceed, in the exercise of the power of eminent domain, to fix the compensation if the parties do not agree. If Congress had intended to authorize the Commission to fix the compensation for carriers already bound by contract to a different compensation, Congress would not have limited the power of the Commission in the fixing of compensation to those cases where the parties fail to agree, because the parties, if satisfied between themselves with their contract, could completely checkmate any action initiated by the Commission. All they would have to do, after the Commission had ordered the use, would be to agree again

upon the compensation to which they had already agreed in the contract.

If Congress had intended to give the Commission the power to set aside contracts already made, and to fix the compensation, regardless of such contracts, it would have made such intention clear, and it would not have left it to be extracted by a process of refined reasoning from provisions which are appropriate for ordinary proceedings in eminent domain as between parties who are unable to agree, and are wholly inappropriate to the fixing of compensation by the Commission in disregard of the agreements of the parties.

To paraphrase the language of Mr. Justice Holmes in *Davis* v. *Pringle,* 268 U. S. 315, 318: It is incredible that, after the use of language appropriate to parties not under contract with each other, Congress should have intended to smuggle in a provision to destroy solemn contracts of a proprietary nature by muffled words.

Congress, in the Transportation Act, met a practical situation in a practical way. It knew that many of the railroads of the country had extensive terminals which other companies could not use, and which the public interest might require to be shared. It also knew that there were many other terminals, including all of those owned by the so-called terminal companies, which were already used by a number of carriers under long-time contracts, upon the credit of which bonds had been issued and sold to the public. Congress recognized that the public interest might require that the first class of terminals be opened up to other carriers. The second class were already opened up to other carriers to the

extent of the contracts already in effect, and could be opened up still further to accommodate other carriers not having the benefit of such contracts. The language used is appropriate to this end. It is not appropriate to any other.

It shows that the *intention of Congress* was to give the Commission power, when it found it in the public interest, to require the joint use of terminals, where no previous arrangement for such use existed and the parties themselves were unable to agree. Congress just as plainly did not intend to authorize the Commission to step in where contracts were already in effect providing for the joint use of terminal facilities and the carriers interested were actually making joint use of such facilities—merely because one or more of the carriers might think that the contract which it had made was, perhaps, not as favorable to it as some other contract might have been. Congress intended that the Commission should be in a position *to secure for the public the requisite service.* It did not intend to make the Commission a court of equity to reform existing contracts nor a court of law to settle disputes between the carriers growing out of such contracts.

In what situation are the petitioners?

Each of them is already entitled to the use of the facilities by virtue of a contract effective for a period of two hundred years. (R. 14, 17, 47, 48.) By virtue of the Operating Agreement, the franchise ordinance which is referred to in the Commission's report (R. 76), the equitable ownership of the stock of the Terminal

Company and the unity of ownership and control effected by the Stock Trust Agreement (R. 120, 137), each of them is also in practical effect the owner of an undivided interest in the entire property of the Terminal Company. In view of the elaborate character of the organization and machinery for control, the Terminal Company somewhat resembles a corporate trustee, holding legal title to the property, with the equitable title in the proprietary companies. (Cf. *Chicago, Milwaukee & St. Paul Railroad Company* v. *Des Moines, etc., Railway Company,* 254 U. S. 196.)

It is plain that neither of the petitioners (themselves proprietary companies) can be classed as "another carrier," to which Paragraph (4) of Section 3 gives the Commission power to extend the use of terminal facilities.

It follows that the Commission has no power to fix the compensation to be paid by them. Its power in fixing compensation is limited to those cases where it requires the use. Where the parties already have the right of use, the statute is silent as to any right to fix compensation. The appellants, therefore, do not come within the class of carriers for which the Commission has the power to fix the compensation to be paid.

If Congress had intended to give the Commission any such power, it would have been perfectly simple to use appropriate language for that purpose. It would have been provided expressly, first, that the Commission should have the power to require the joint use of termi-

nal facilities by any carrier whether previously entitled thereto or not, and also the power "to revise, readjust or ignore all existing contracts between carriers relating to terminal facilities, and to prescribe the terms and conditions upon which such carriers shall make joint use of the facilities owned by either or all of such railroads, or to the enjoyment of which either or all of such railroads by contract may be entitled, including the payments to be made and the services to be performed by either or all." Congress would not have left such extraordinary powers to be inferred from general language. If Congress had intended to destroy solemn contracts, without compensation, it would have made that intention plain.

This Court, in a number of quite recent cases, has made it clear that while the Transportation Act inaugurated a new policy and greatly enlarged the powers of the Commission, it enlarged them only with respect to the matters regarding which specific authority is conferred by the amendments. It did not authorize the Commisson to create for itself new powers merely because it might conceive they were in line with the declared policy of the Transportation Act.

> "But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements." (*Atchison, Topeka and Santa Fe Railway Company* v. *United States,* 284 U. S. 248, 262.)

Specific authority must be found in the Interstate Commerce Act to authorize the Commission to impose

unusual burdens on carriers by unusual methods. General language is not sufficient.

In *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52, this Court held that the Interstate Commerce Commission had no power to require the construction of a union station by railroad companies. After various attempts to bring about the construction of a union station, the City of Los Angeles brought a proceeding before the Interstate Commerce Commission, asking that the railroads be ordered by the Commission to construct and use such a station. The Commission held that it was not empowered by Congress to make such a requirement. This Court denied mandamus. The Court construed various general provisions of the Act, which it was claimed conferred the power, and held that a power of this character, affecting as it would the important property interests of the railroads, must rest upon express language, and that it could not be fabricated out of general expressions. This Court says:

> "In weighing the effect of the Transportation Act, it should be noted that in this important measure affecting associations between interstate carriers of a compulsory character, *there is nowhere express authority for the establishment of union passenger stations, compulsory or otherwise.*" (l. c. 67.)
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> "The Commission was created by Congress. If it was tc be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at

a new site, *that power we should expect to find in congresional legislation.*" (l. c. 68.)

* * * * * * *

"If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act. *The suggestion of complainants is that* out of provisions for local union of main tracks and switching tracks *we should use our imaginations and develop them into provisions for giant union passenger stations.*" (l. c. 70.)

Interstate Commerce Commission v. *Oregon-Washington River Navigation Company,* 288 U. S. 14, involved an order of the Interstate Commerce Commission, which required the Oregon-Washington River Navigation Company "to extend its line of railroad now terminating near Burns, Oregon, from or near a station thereon designated as Crane, Oregon, to a connection with the Cascade Line of the Southern Pacific Company at or near Crescent Lake, Oregon." (l. c. 22.) The Court held that the order exceeded the Commission's powers and should, therefore, be set aside. The Commission had based its order upon Paragraph (21) of Section 1 of the Transportation Act (U. S. C., Tit. 49, Sec. 1 (21)), which, along with Paragraphs (18) to (20) of Section 1, forbidding extensions, construction of new roads or abandonments without the order of the Commission, was added by the Transportation Act of 1920. (41 Stat. L. 456, 476.) By Paragraph (21) the Commission was given power to require any carrier "to pro-

vide itself with safe and adequate facilities for performing as a common carrier its car service, as that term is used in this chapter, and to extend its line or lines." The court held that the phrase, "and to extend its line or lines," must be construed in its context, that the extensions mentioned had to do with car service, and that the clause was not intended to create a wholly independent subject of jurisdiction. This Court says:

> "• • • In the proviso the furnishing of facilities and extension of lines are blended as belonging in a single class. We should expect, *if Congress were intending to grant to the Commission a new and drastic power* to compel the investment of enormous sums for the development or service of a region which the carrier had never theretofore entered or intended to serve, *the intention would be expressed in more than a clause in a sentence dealing with car service.*" (l. c. 35.)
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> "Moreover, if the purpose were that claimed by the Commission, support should be found in legislative history. But none has been called to our attention." (l. c. 35.)

In *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, it was held that Paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act did not authorize the Interstate Commerce Commission to control the abandonment of an intrastate railroad, whose situation and ownership were such that interstate and foreign commerce could not be burdened or affected by a discontinuance of its business. This court says, with reference to the paragraphs of the act relied on:

"As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. * * * And *had there been a purpose here to depart from the accustomed path* and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, *it is but reasonable to believe that that purpose would have been very plainly declared.* This was not done." (l. c. 217, 218.)

Furthermore, it is apparent from reading the appellants' intervening petitions that they are not really seeking a remedy under Paragraph (4) of Section 3. They do not want an order requiring their use of the facilities and the ascertainment of compensation "on the principle controlling compensation in condemnation proceedings." They want something very different. They want a revision of the Operating Agreement and a readjustment and reapportionment of the fixed charges among the various proprietary companies. They ask for an order which will place the use and terms of use "on a fair, just and equitable basis among such parties in accordance with and in proportion to the use made thereof by the various parties." (Intervening petition of the Kansas City Southern, R. 63, 69.)

In fact, counsel for Chicago Great Western conceded before the Commission that Section 3 (4) was inapplicable. In their brief on the exceptions to the report of the examiner they said:

"It is true that these interveners do not rely at this stage of this proceeding upon Section 3 (4) of

the Act to Regulate Commerce. *Obviously, they cannot rely upon this provision of the law, for as the matter now stands they have the use of the Kansas City terminal under the provisions of the operating contract, which fixes the compensation. That paragraph of the law referred to contemplates the acquirement of the right of use by a carrier which does not have the right.*"

OTHER SECTIONS OF THE ACT.

At page 36 of petitioners' brief it is now said that "the Commission also had the suggested power under other sections of the Interstate Commerce Act." This assertion is difficult to answer, only because we are not told what sections are meant.

There is a hint at page 36 that Sections 12 and 13 are referred to; but a glance at those sections shows that they relate to investigation and procedure, not to the exercise of regulatory powers.

They cite cases in which language descriptive of the broad powers of the Commission is used, but *in every case* the language is used with reference to *some provision of the act granting specific powers.*

Let us glance at some of these cases cited by petitioners.

In *Smith* v. *Interstate Commerce Commission,* 245 U. S. 33, the Commission, in pursuance of a resolution of the United States Senate directing the Commission to investigate and report to the senate upon certain financial relations of the Louisville & Nashville Railroad Company and other carriers, had begun an investigation and had propounded to the president of the Louis-

ville & Nashville Railroad Company certain questions which, upon advice of counsel, he declined to answer. These related to expenditures by the carrier for political and related purposes and the manner of their being charged upon the books of the carrier. This Court held that the questions must be answered, using the language quoted in petitioners' brief.

The Court pointed out the purpose of the questions to ascertain "whether the amount subscribed or expended was charged to operating or legal expenses" (l. c. 42), the "complete comprehensiveness of the language of these sections" [Sections 12, 13 and 20] (l. c. 43), and held, as to the questions, that "they are quite special, and we regard them as the learned judge of the court below regarded them, as but incident to the amount of expenditures and the manner of their charge upon the books of the company" and that "this we repeat is within the power of the Commission." (l. c. 46.)

We are at a loss to understand how a power to investigate the manner of charging expenditures upon the books and their amount, expressly conferred by sections whose language this Court says is characterized by "complete comprehensiveness," can create a power not even *mentioned* in any section of the Act.

In *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, the Commission had ordered increases in passenger interstate fares in compliance with the mandate of Section 15 (a). The Wisconsin Commission denied a corresponding increase in intrastate fares because of the maximum fare

provision of the Wisconsin statutes. The Interstate Commerce Commission found that this constituted a discrimination against interstate passengers and ordered the intrastate fares increased. The remarks of the court about the policy of the Transportation Act had reference to the *express* powers conferred by Section 13 (3) and (4) and Section 15 (a), which were quite germane to the policy of the act as expressed by the court.

The *New England Divisions Case,* (*Akron, etc., Ry. Co.* v. *United States*), 261 U. S. 184, involved Section 15 (6), as amended, which gave the Commission power to prescribe the division of joint rates. The language of the Court regarding the purpose of the Act was with reference to this *express* power, which was directly connected with the rate-making provisions designed to accomplish the purpose referred to.

Dayton-Goose Creek Railway Company v. *United States,* 263 U. S. 456, involved the recapture clause. (Section 15 (a) (5)-(7).) The Court says, it is true, that the Transportation Act of 1920 "puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission" (l. c. 478), but this language obviously refers to the extent to which Congress has enlarged the powers of the Commission *by the Act*—and particularly by the *express* powers mentioned by the court in the quotation set out in petitioners' brief. It does not mean that the Commission has unlimited powers, or, in fact, any powers other than those given by the Interstate Com-

merce Act, as amended by the Transportation Act. These powers are broad enough to justify the expression of the Court without twisting that expression into a grant of still further powers.

Railroad Commission v. *Southern Pacific Company*, 264 U. S. 331, arose, not under Section 3, but under Paragraphs (18) to (20) of Section 1, relating to the extension and abandonment of facilities. The Court merely held that the railroad companies could not be required to provide a new union station and extend their main tracks thereto, unless and until the Interstate Commerce Commission should act under the paragraphs referred to and thus authorize the extension. The language quoted by petitioners had to do with Section 20 (a) giving the Commission powers with respect to the issuance of securities, and was used to illustrate the general intent of Congress in giving the Commission *express* power over extensions. The second Los Angeles case heretofore referred to (*Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52) made it clear that even this express power was not to be stretched beyond the ordinary meaning of its language.

Colorado v. *United States*, 271 U. S. 153, arose under Paragraphs (18) to (20) of Section 1, giving the Commission power to authorize the extension or abandonment of facilities. The Commission, by its order, authorized the abandonment of a line entirely within the State of Colorado but used in interstate traffic in connection with lines extending outside the state. The language of the Court was used with reference to this *express* power.

In *Texas* v. *United States,* 292 U. S. 522, the power of the Commission was expressly derived from Section 5 of the act as amended by the Emergency Transportation Act of 1933, and this Court held that a burdensome state statute could not limit that power. The language of the Court with reference to the policy of the Act was used to illustrate the extent of this *express* power.

Transit Commission v. *United States,* 289 U. S. 121, involved the *express* power given by Paragraph (18) of Section 1. The question was whether it applied to the acquisition of trackage rights as distinguished from the acquisition of the right to operate a line to the exclusion of other companies. The Court held that Paragraph (18) covered such an arrangement. The Court said, in substance, that expenditures for the construction of new lines and expenditures for trackage rights were on the same basis, and that in each case the amount to be expended could be considered in determining whether the public interest would be served by granting the certificate. The Court says:

> "The *words employed* are broad enough to cover the Long Island operations under the trackage agreement." (l. c. 128.)

The Court did not, as suggested by petitioners, base its conclusion upon the "general purpose of the act"; but, as stated by the Court, upon "the words employed."

Florida v. *United States,* 292 U. S. 1, involved the power to remove discriminations against interstate commerce resulting from intrastate rates, under Section 13,

(3), (4). It was contended, among other things, that the findings of fact by the Commission did not support its order finding such discrimination. The language of the Court, quoted by petitioners, was used with reference to this contention, and in applying the *express* power above referred to.

In *Alabama & Vicksburg Railway Co.* v. *Jackson & Eastern Railway Co.*, 271 U. S. 244, an *express* power was sustained and applied—that given by Paragraphs (18) to (20) of Section 1. Petitioners say with reference to this case that "this court has held that the power of the Commission over the general operations of carriers is so broad that it may exist and be exercised even in the absence of a specific provision of the Act authorizing such action." (Petitioners' Brief, p. 41.) This Court held no such thing. On the contrary, the Court found specific authority over the subject in Paragraphs (18) to (20) of Section 1. This Court held that physical connections between railroads engaged in interstate commerce fell within the term "the extension of its line of railroad or the construction of a new line of railroad" as used in these paragraphs. Other provisions of the Act were referred to as indicating that this language was to be construed liberally. The Court most certainly did not hold that the Commission would have power over such physical connections in the absence of this specific grant by Congress.

Cincinnati, etc., Railway Company v. *Indianapolis Union Railway Company*, 36 F. (2d) 323, did not involve

the Interstate Commerce Act at all. The court exercised a long-settled equity jurisdiction with reference to the adoption or rejection of contracts by purchasing companies, and used the language quoted *arguendo,* along with other arguments, to support its decision permitting the purchasing company to rescind a previous election and file a new one.

None of the decisions of this Court cited by petitioners furnish any support whatever for their argument that the Commission is authorized to set aside this contract because of some alleged vague purpose of the act to remove burdens from carriers. Congress did intend to give the carriers some relief and gave the Commission certain powers to that end. To the extent of those powers the Commission is authorized to grant relief, but no further. Congress did not, by granting those powers, intend to give the Commission blanket authority to give relief *outside* of those powers. Certainly, there is not the slightest justification for asserting that Congress intended to give the Commission authority to set aside at will contracts previously entered into, and under which extensive investments have been made, any more than it intended to give authority to set aside deeds of conveyance previously paid for and received—merely because the Commission might think that the railroad company had incurred too heavy an obligation under the contract, or paid too much for the land.

The general language in the *New England Divisions Case* and the *Dayton-Goose Creek Railway Company Case* has been definitely characterized and limited by this Court

in *Interstate Commerce Commission* v. *Oregon-Washington Railroad Company,* 288 U. S. 14, and what the Court says about these cases, slightly paraphrased, applies equally to the other cases cited by the petitioners and above referred to. We quote from the opinion of the Court at page 41:

> "The statements in *New England Divisions Case,* 261 U. S. 184, and *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, in respect of the purposes of the Transportation Act, on which appellants rely, must be read, having in mind the situations there presented and the nature of the orders approved. Care was taken in those cases to demonstrate that the sections upheld did not, in application, go beyond the regulation of rates and the disposition of the excess over a fair return collected by a carrier, and it was shown that no taking or confiscation of property resulted. Those decisions are far from sustaining the validity of an order which seeks to require the investment of millions of dollars in a new venture in undeveloped areas."

It is evident that counsel are, by their argument on this point, reviving the suggestion made by them before the Commission, but up to now abandoned in this mandamus case, that the Commission can derive powers from some vague pervasive spirit of the act, without any language in the act appropriate to create such powers. Before the Commission they tied their kite to Section 15 (a) and "other law" and let it take them where it might. We quote from the brief of petitioner, Chicago Great Western Railroad Company, filed before the Commission on exceptions to the examiner's report:

> *"We do not maintain that there is any provision of the Act to Regulate Commerce, as now enacted, specifically conferring upon this Commission power to require a readjustment of payments made by carriers under operating contracts such as are here involved,* although it is said in the Recapture Case, *supra,* that this Commission has supervision of the joint use of terminals. The law, however, does require this Commission to fix such rates by groups as will give a fair return to the carriers operating therein; and does provide that only those carriers efficiently and economically operated shall be entitled to the benefits of the law; and does require this Commission to take such steps as may be necessary to provide and maintain an adequate railway service for the people of the country."

Petitioners argue that no rewriting of the Operating Agreement is desired, that they merely want to have one provision of the Operating Agreement changed—the amount payable by the respective companies on account of interest and taxes. Of course, this in itself is a revision—whether or not there is a physical rewriting. If the amount payable by the petitioners were reduced, then the Terminal Company would either be without funds to meet its interest and taxes or the amounts payable by other proprietary companies would have to be increased. We are immediately met with the question, by what authority can the Commission order a company to pay more for the use of physical property than it has contracted to pay? But passing that question, if the Commission should so order, is not the effect a revision of the agreement? But that is not all. Assuming, for the sake of the argument, that a change were made in this provision, based upon a find-

ing of equity, would it not be necessary, in order that equity might really be done, that other changes be made to conform the relations of the parties to their new status in respect to interest and taxes? Might it not be necessary to alter the provisions for care of equipment, etc., so as to give those who were carrying the burden of the capital charges some profit on the transaction? Might not the same thing be required in in regard to the provisions covering expenses of operation and maintenance?

The justice of apportioning expenses of operation and maintenance on a car mileage basis is only approximate. A large part of the expense of maintenance is required regardless of use. Ties will rot, roadbeds deteriorate, appurtenances become obsolete, whether the tracks are used or not. Consequently, a part of such expenses might well be apportioned equally among all the owners. The provision for division of interest and taxes in a measure adjusts this discrepancy. If one factor, however, were disturbed, would it not require an entire reconsideration of the other? In other words, would it not be necessary to readjust the whole contract so as to make an equitable whole rather than to slash into one provision of the contract, leaving the rest of the contract somewhat inappropriate for these changed conditions?

The cases of *L. & W. R. Co.* v. *Mottley*, 219 U. S. 467, *New York* v. *United States*, 257 U. S. 591, and other cases cited on pages 49 and 50 of petitioners' brief, have no application in this case. While, in some instances, contracts which undertake to control matters within the

regulatory powers of Congress will not prevent the exercise of the paramount power of Congress, there are always two elements in such cases. *First,* the field is always clearly one within the police powers of Congress, and *Second,* Congress has unmistakably evinced its intention to exercise its power over the particular subject matter. In no case has this Court held that a valid contract can be superseded by the action of an administrative body, not authorized by any specific provision of any act of Congress, but sought to be justified by a supposed plenary control over the parties involved—an extent of destructive control which Congress itself has never undertaken to exercise over private property.

THE COURT OF APPEALS OPINION.

While the Court of Appeals held that mandamus would not lie against the Commission, whether the Commission's construction of the act was right or wrong, it is evident from the opinion, and the court in effect declared, that the Commission did not have the powers asserted by the petitioners. The court said (71 F. (2d) l. c. 340, R. 254):

> "And we may remark in passing that, to justify the Commission in the exercise of such authority as is asked, the right to do so should be expressed in clear and certain language. • • • but it is going too far to say that all or any of these powers of themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist."

ACT SHOULD NOT BE SO CONSTRUED AS TO RAISE GRAVE CONSTITUTIONAL QUESTIONS.

Even if there were ambiguity in the language, there would be no difficulty in reaching its proper interpretation. To interpret it as petitioners advocate would at once raise grave constitutional questions.

We expect to show later that they would be insuperable. It is enough here that they are serious. It is a thoroughly settled principle of statutory construction that an interpretation which would render a statute unconstitutional or of doubtful constitutionality will never be adopted if any other interpretation is permissible. (*United States* v. *Delaware & Hudson Company,* 213 U. S. 366, 407; *State of Texas* v. *Eastern Texas R. R. Co.,* 258 U. S. 204, 217.)

> "Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind." (*Lewellyn* v. *Frick,* 268 U. S. 238, 251.)
>
> "We do not discuss the question whether it [Congress] could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent." (*Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298, 306.)

If Congress had intended to confer upon the Commission the right to destroy contract relationships between railroad companies, upon which their rights of property are established, and upon the faith of which money for the construction of facilities has been borrowed from trusting investors, Congress would have so provided. It would not have left any such extraordi-

nary power to be inferred from language authorizing the condemnation of trackage rights generally, nor from general language directed against discrimination by carriers.

In *Interstate Commerce Commission* v. *Oregon-Washington Railroad Company*, 288 U. S. 14, the Court says (l. c. 40, 41):

> "There is another consideration which supports the construction adopted. Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. The views advanced by the appellants, to say the least, raise serious questions in this respect. The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation. The Transportation Act has not abolished this proprietorship. * * * The decisions of this court will be searched in vain for the announcement of any principle of Constitutional interpretation which would support the order of the Commission."

PETITIONERS' CONSTRUCTION RENDERS ACT IN VIOLATION OF FIFTH AMENDMENT.

The construction put upon the Act by petitioners makes the Act unconstitutional. It plainly amounts to a deprivation of the property of this respondent, of the other proprietary companies, and of the holders of the bonds sold by the Terminal Company. Not only does it result in the destruction of the Operating Agreement, it also disrupts and destroys the property rights vested in the proprietary companies and in the Terminal Company by reason of the valuable properties surrendered by some

of the companies, the equitable interest in the property of the Terminal Company obtained by all, and the vast investments made by the Terminal Company on the faith of the contracts entered into.

> "* * * *The powers possessed by the commission are delegated by Congress under, and are to be exercised in conformity with,* the constitutional grant of authority to regulate interstate and foreign commerce." (*United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 282 U. S. 311, l. c. 324.)
>
> "* * * We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196; *Lottery Case,* 188 U. S. 321, 353." (*Adair* v. *United States,* 208 U. S. 161, l. c. 180.)

OPERATING AGREEMENT IS PROPERTY.

(a) The Operating Agreement is a contract which establishes valuable proprietary rights as between the parties to it, and unquestionably is property. (*Adkins* v. *Children's Hospital,* 261 U. S. 525, 545; *Coppage* v. *Kansas,* 236 U. S. 1; *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Missouri-Kansas-Texas R. R. Co.* v. *Oklahoma,* 271 U. S. 303; *United States* v. *Chicago, etc., Railroad Company,* 282 U. S. 311, 327; *Green* v. *Edwards,* 31 R. I. 1, 77 Atl. 188; *People* v. *Kempner,* 139 N. Y. S. 440 (affirmed 208 N. Y. 16, 101 N. E. 794); *Western Massachusetts Co.* v. *Hilton,* 58 N. Y. S. 996.)

Of course, it is possible that Congress might authorize the taking of contract rights as well as phys-

ical property for public use, but in such event, the Fifth Amendment would require that just compensation should be ascertained and paid for the destruction of the contract rights. (See *Offield* v. *New York, etc., Co.*, 203 U. S. 372; *Monongahela Navigation Company* v. *United States*, 148 U. S. 312; *Adair* v. *United States*, 208 U. S. 161; *United States* v. *Chicago, etc., Railroad Company*, 282 U. S. 311.)

The parties to the Operating Agreement would, therefore, be entitled to compensation for the acquisition or destruction of their property rights.

They would also be entitled to compensation for the destruction of vested rights of those roads which transferred properties to the Terminal Company for the common enterprise.

The Act, however, contains no provision for condemning contract or other rights nor providing compensation therefor, and appellants, by their interpretation of the Act, deny that the Act contemplates their condemnation or the payment of compensation for them.

BONDHOLDERS ENTITLED TO DUE PROCESS OF LAW.

(b) The trustee in the Terminal Company's First Mortgage is a party to the Operating Agreement, and the Operating Agreement has been assigned to and pledged with the trustee by all of the parties to the Operating Agreement as security for the first mortgage bonds of the Terminal Company. (R. 16, 39, 91.) The contract rights of the bondholders are vested rights, and the cases above cited under the preceding point apply equally here.

In addition, neither the trustee in the mortgage nor the bondholders were parties to the proceeding before the Interstate Commerce Commission and could not be made parties since the Interstate Commerce Act gives the Commission jurisdiction only over carriers. It does not give the Commission jurisdiction over the private rights of individuals, banks and other corporations.

The first principle of due process of law is notice and an opportunity to be heard. (*Davidson* v. *New Orleans*, 96 U. S. 97; *Hager* v. *Reclamation District*, 111 U. S. 701, 708; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413.)

In *Coe* v. *Armour Fertilizer Works, supra*, the court says, with reference to the Fourteenth Amendment:

> "which requires at least a hearing or an opportunity to be heard in order to warrant the taking of one's property. (l. c. 423.)
>
> • • • • • • •
>
> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the constitution requires. (l. c. 424.)
>
> • • • • • • •
>
> " 'This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace.' " (l. c. 425.)

Due process of law in the Fifth Amendment has the same meaning as in the Fourteenth Amendment. (*Twining* v. *New Jersey*, 211 U. S. 78, 101.)

Even if the trustee and the bondholders had had notice, their interest in the mortgage is property, which

is protected by the due process clause and cannot be taken without just compensation. "It is fundamental that a mortgage or trust deed securing an indebtedness is 'property' within the meaning of the Constitution of the United States." (*Illinois Trust & Savings Bank* v. *City of Des Moines*, 224 Fed. 620, 621.)

See, also, *Bradley* v. *Lightcap*, 195 U. S. 1.

Petitioners' argument (page 56 of their Brief) that it makes no difference to the bondholders whether the Operating Agreement is maintained or not, is palpably fallacious. The bondholders are entitled to the full benefit of the covenant of *every party* to the Operating Agreement that it will pay its part of the principal and interest of the bonds, *promptly when due* (*i. e.* ten days before the Terminal Company must pay the interest on the bonds), and all of it ultimately, even if every other party should be insolvent or out of existence. (See Article II, Section I of the Operating Agreement, especially Paragraphs (a), (b) and (f) (R. 20, 21).) They are entitled to hold the Kansas City Southern and the Chicago Great Western, which are solvent companies, for the full amount of their proportionate part of principal and interest (R. 21), and their proportionate part, or the whole, of any amount which may be payable on account of the default of any other company. (R. 21.) They cannot be forced to wait and see what amount the Terminal Company may happen to collect from other companies pursuant to some order of the Commission. They are entitled to the full benefit of the covenants of the parties which made them.

THE BACKGROUND OF THE RECORD.

Mr. Justice Holmes, while chief justice of the Supreme Judicial Court of Massachusetts, said with reference to certain objections raised to the condemnation of lands for the South Station in Boston:

> "The truth is that the supposed objections are of so shadowy a form and consist so largely of rhetorical expressions, that it is hard to grapple with them, and yet that they derive a kind of life from the atmosphere of the cases." (*Sears* v. *Board of Street Commissioners,* 180 Mass. 274, 62 N. E. 397, l. c. 400.)

The petitioners have created a similar atmosphere. The atmosphere of the case here is the assumption, reiterated in various forms, that the Operating Agreement is grossly inequitable and the repeated use of expressions by this Court, detached from their context, with reference to the broad powers possessed by the Interstate Commerce Commission. It was undoubtedly this atmosphere of the case which led the Court of Appeals of the District of Columbia to indulge in the *obiter dicta* quoted at page 46 of the petitioners' brief. There is no basis in the Interstate Commerce Commission's report for the conclusion expressed in these *obiter dicta.* They are based on the assertions of counsel, the figures set up in an exhibit, the conclusions drawn from which were not admitted, and, perhaps, on the remarks contained in the dissenting opinion of Commissioner Eastman, which itself consisted largely of conclusions and which, so far as it undertook to state facts, did not state them fairly.

We have felt that the fairness or unfairness of the Operating Agreement is not properly an issue in this, a mandamus case, and, consequently, have avoided discussing it in our briefs. Since, however, the Court of Appeals has apparently been misled by petitioners' assumptions and conclusions and by our silence, and since petitioners in their brief (Summary of Argument, 2 (d), page 13) state that the "undisputed facts" show that the division of payments constitutes prejudice and discrimination (see also page 47 of their Brief), it seems desirable, if not necessary, that we discuss the subject briefly. We shall endeavor not to make it a controversial issue, but to discuss it far enough to show this Court that there is no basis for the assumption, so artfully insinuated by the petitioners and apparently accepted by the Court of Appeals without analysis, that there is only one side to the question and that the equities are necessarily with the petitioners.

Where necessary, we may occasionally refer to undisputed facts not clearly set forth in the Commission's report, but contained in the record before the Commission. In the main, however, the facts are clearly set out in the Commission's report.

As a basis for their conclusions, the petitioners argue that the payments made by the proprietary companies on account of interest and taxes, payable by the Terminal Company, are merely payments for the use of facilities and, consequently, that a company, which, at the time, happens to use the facilities less than another company, should pay a less amount.

This argument purposely ignores the whole history of the enterprise and the actual relations of the parties —though these are well known and are set out in the report of the Commission. (R. 75-89.) The proprietary roads did not come to the Terminal Company, an owner of a system of terminal facilities, and bargain for the use of the desired portions. They, themselves, organized the Terminal Company. (R. 76.) Their officers were the directors of the Terminal Company. (R. 89.) They laid out the plans under which its facilities were constructed and designated the properties to be acquired by it. While the petitioners were not in the first negotiations, they became parties to the contract very soon after the original execution of the contract and before the construction work was done. The plans for the facilities were not actually attached to the Operating Agreement at the time of its execution. They were not completed until long afterwards and the petitioners had their voice in their formation, just as did the other proprietary companies. (R. 77, 89.)

Neither of the petitioners was obliged to become a party to the agreement. They occupied together a passenger station which, so far as the record shows, satisfied their needs. (R. 76.) The Kansas City Southern peremptorily and persistently demanded that it be permitted to become a party. (R. 89.) To have refused it admission on the same terms as the other proprietary companies would have subjected the Terminal Company and the other proprietary companies to possible violation of the anti-trust laws. (*United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383.) After

the Kansas City Southern had demanded the right to admission, the Chicago Great Western (which, at the time, occupied with the Kansas City Southern the Kansas City Southern passenger station (R. 76)) was invited to become a party and did so. (R. 89.)

The project, as clearly shown by the record, was of necessity a matter of compromise among the conflicting interests of the carriers. This was largely because the carriers respectively had settled locations for their entrance to the city and yards and other facilities. What was advantageous for one carrier in the construction of the terminals might be less advantageous for another carrier, and *vice versa*. This is illustrated by the matter of the location of the Union Station. The original station site in the west bottoms was greatly preferred by the Burlington and some other carriers because it lay immediately at their entrance to the city. (R. 82A.) It was convenient to their yards, and naturally their operating expenses would be lessened by its use. The same thing was true of the north end site as to other carriers and of the site finally selected as to still other carriers. (R. 89.) Similar considerations obtained with respect to other facilities. The so-called High Line, an elevated line leading from a point west of the Station across the Kaw River and through Kansas City, Kansas (R. 79), one branch being used by the Chicago Great Western and the Missouri Pacific and the other branch by the Rock Island and the Union Pacific, was of direct and paramount utility to the carriers which would use it. It was of no direct utility to the other carriers, but it was of decided in-

direct advantage to many of them, in that it removed a large amount of traffic from surface tracks which would otherwise be burdened by it and eliminated many crossing delays which would necessarily result from giving preference to the passenger traffic of the four roads named. The so-called West Bluffs Line (R. 80) was of direct advantage to the Burlington, Wabash and Rock Island, the roads using the so-called Hannibal Bridge (R. 80), because it gave them speedy and uninterrupted passenger entrance into the Union Station. Like the High Line, its benefit to the other roads was the indirect benefit of removing this passenger traffic from the surface lines. On the other hand, it might be said that the necessity of having this line was a disadvantage to these three roads because their operating expenses were undoubtedly increased over what they would have been had the station been located at the old site, since, under the provisions of the Operating Agreement apportioning operating expenses on the basis of the car mileage in the particular zone, these three roads, as the sole users of this zone, are obliged to pay all of the operating expenses. Conversely, if the Station had been located in the north end or at the old union station site, the roads which enter the city from the south, such as the M-K-T and the Frisco, would have been obliged to increase their operating expenses by using this or a similar line to reach the other locations. (R. 89.) In a similar way, the location of the Station on the south side required the roads which enter the city from the east to use about six and one-half miles of track along the line of the

old Kansas City Belt Railway which, on account of the contour of the country and the cost of real estate, was an expensive line. The operating expenses of these roads were thereby greatly increased. Again, the North End Freight Line was of marked importance to the Chicago and Alton. On account of the failure to complete certain tracks around the goose neck to connect with tracks leading to the west (R. 90), the chief use of this line is by the Alton. (R. 79.) The result, of course, is that most of the operating expenses of this line fall upon the Alton. The coach and engine yards for the care, repair and cleaning of locomotives and coaches were greatly desired by some of the roads but others use them little or not at all. (R. 79.) Freight stations were constructed at strategic points, at which freight is received and delivered for all of the roads. (R. 80.) Other illustrations might be given, but these will suffice to show that the project was in every sense a joint project (R. 80) and that the Terminal Company was merely the corporate instrumentality for effecting what was in substance an undivided ownership of the facilities. The Terminal Company was in effect a trustee holding legal title to the property, but with the equitable title as well as the ultimate control of finances and operations in the proprietary companies. (Cf. *Chicago, Milwaukee & St. Paul Railroad Company* v. *Des Moines, etc., Railway Company*, 254 U. S. 196.) Each of the roads reserved to itself, through the Operating Agreement (R. 77) and through the franchise ordinance granted by the City of Kansas City (R. 76, 83, 84), the absolute and un-

restricted (subject only to the reasonable regulations of the Terminal Company) right to use each and every part of the terminal facilities, except industry tracks, team tracks, etc. No road had any preference over any other road in this respect. Their right of use was not only absolute and complete, but it was joint and equal. (R. 17, 18, 80, 186.)

In order to preserve and guarantee the perpetuity of this joint and equal ownership and control, the roads joined in the organization of the Terminal Company, each of the roads subscribing for an equal part of the capital stock. (R. 76.) This capital stock, except for qualifying shares for directors, was transferred to a trust company as trustee under a Stock Trust Agreement, by which the roads were entitled to receive from the trustee all dividends which might be declared upon the stock, and, so long as it was not in default under the Operating Agreement, to receive proxies executed by the trustee, entitling the railway company to vote the stock. (R. 77, 122, 125.) It was also provided that, in case any railroad company should default in its obligations under the Operating Agreement, the stock deposited by it should be held by the trustee for the use and benefit of the nondefaulting companies. (R. 125.) It was provided in the Operating Agreement that each road should agree to pay into the treasury of the Terminal Company, ten days before any interest or taxes on the first mortgage bonds of the Terminal Company might be due, each one-twelfth of the amount so payable for interest or taxes, and, in case of default by any company, its proportionate part of the amount so in default.

(R. 20, 21.) Since each of the proprietary companies, as a virtual joint owner, had the right under the Operating Agreement to run its trains over each and every part of the facilities at its election, but obviously might not at any particular time elect to do so, it was provided in the Operating Agreement (R. 25) that each road should pay its proportionate part of the operating and maintenance expenses of the part so used by it. In order to permit the necessary accounting and the proper apportionment of expense, the property was divided into various zones, the limits of each zone as a rule marking the limits of a given common use of a certain section of the property —not designating an independent facility. (R. 78, 82A.) The boundaries of the zones were to be fixed by the board of directors representing all of the roads. (R. 25.) The Operating Agreement provided that the expenses of the Union Station zone should be apportioned on the basis of the number of cars and engines entering said zone. (R. 25.) The expenses of most of the trackage zones were apportioned on the basis of car mileage, and the expenses of other zones on various different bases. (R. 26.)

It is obvious that these different bases of distribution are necessarily somewhat arbitrary and may in themselves call for a certain amount of compromise as between the various roads. For example, a short train in the Union Station may occupy a given track for as long a time as a longer train. Consequently, a train of twelve cars probably does not use the station fifty per cent more than a train of eight cars and yet, it would pay fifty per cent more towards operating expenses. A

through train entering the station and leaving the station a few mintues later does not actually use the station twice as much as the same kind of train having its origin or destination in Kansas City, yet it prays twice as much. (R. 26.)

In another respect the agreement had to be the result of compromise. Certain roads had facilities which were needed as a part of the whole terminal project. The Kansas City Belt Railway was the backbone of the main line to be established on the south side. It was owned by three of the roads. As a part of the project, it was transferred for the benefit of all of the roads at book value—much less than the value claimed for it. (R. 89.) Unless it had been so transferred, it would have been virtually impossible to have located the station where it was located, as the Belt Railway occupied practically the only available route from the Union Station to the easterly part of the city. It was possible to widen this right of way, but it would have been difficult, without vastly enhanced expense, to acquire an entire independent right of way of sufficient width. Some of the necessary lands for the construction of facilities in the west bottoms, for the construction of the so-called High Line, for the construction of the West Bluffs Line, for the construction of the north end tracks and other facilities, were acquired from the proprietary companies. In some cases they gave up property and facilities which would have been vitally needed by them if the Terminal Company had not supplied their needs.

Again, we must not look at the terminal facilities as if we had merely the question of a union passenger

station. The Terminal is what might be called a unified terminal, almost completely integrated. (R. 78, 82A.) There is probably not another terminal in the United States exactly comparable to it in this respect, at least not another one where every railroad entering the city has the right of access for its trains to every part of the Terminal, without the payment of any charge therefor. Not only is there the Union Station with trackage leading some six and one-half miles to the east and several miles to the west along the High Line, and with connections also both on the north and on the south to bring in the railroads entering the city from those directions (R. 78, 82A), there is also a freight line along the north side of Kansas City, also about six and one-half miles in length (R. 79); a double track freight line through the heart of the network of railroad tracks in the west bottoms of Kansas City (R. 97); an industrial line leading across the Kaw River into Kansas City, Kansas (R. 79), and touching most of the packing houses and large industries; two passenger stations along the High Line in Kansas City, Kansas, for the joint use of the railroads using the High Line (R. 80), freight stations at various points in the city for the joint use of all the roads (R. 80); yards for the assembling and breaking up of cars in order to facilitate interchange (R. 80); connections with every railroad entering the city and switching facilities for the handling of interchange movements between the various roads (R. 80); a system of industry tracks serving a very large number of industries in the city (R. 80); a double track bridge across the Kaw River into Kansas (R. 79); and

numerous other facilities, providing for the railroads facilities which would be of enormous cost to them if they had to supply them themselves.

If the roads had had to supply these various facilities each for itself, each would have determined for itself what the facilities were worth to it and whether it would construct them. It would not have measured such worth by what some other railroad might be expending for its terminal facilities. If some other railroad could get along for a much less figure, very well, that was its business. If some third railroad, on account of anticipation of future needs, desired to expend a much larger sum of money, very well, that was its business.

So, in planning the terminal project which the twelve roads themselves controlled through their representatives on the board of directors, the question to determine was whether the proportionate expenditure which each road would incur was a proper capital expenditure for that road to make.

Since the total cost of the Terminal as of the date of the hearing was approximately $48,000,000 (R. 88, 89), the proportionate capital investment to each road (if the roads had put up the money instead of borrowing most of it) would have been approximately $4,000,000. It is difficult to see how any road could have provided independent freight and passenger facilities, furnishing anything like the conveniences which the Terminal Company furnished, in a growing city of the population and activity of Kansas City, at a figure as low as this; but, whether it could or not, it was certainly a question for the board of directors of each company to determine

whether or not it desired to make such an investment in joint facilities. The situation was no different than it would have been if each road had determined to construct its own terminal facilities independently of all other roads. The fact that the Terminal Company was created as a corporate instrumentality to construct and hold title to the facilities, and to act as an instrumentality for insuring fairness and impartiality among the various equitable owners, does not materially change the substance of the situation.

Let us suppose that, at the time of organizing the Terminal Company, the railroads, instead of providing for the issuance of bonds, had each paid in four million dollars, and had thus acquired and retained an undivided one-twelfth interest in the terminals constructed. Would anybody argue that there is any provision of the Interstate Commerce Act which would authorize the Commission to compel some of the carriers to refund to the other carriers a part of their respective investments? Obviously, the situation would be no different if the carriers, instead of acquiring undivided interests, had caused the Terminal Company to be organized, and had taken aliquot parts of its capital stock in return for their respective four million dollar payments.

Such a transaction is in substance the same as the transaction which actually took place. The only difference is that the railroads, not having sufficient cash available to pay in, paid for their interests, partly in cash and partly by executing a contract, which is, in practical effect, very much the same as a joint and

several guaranty of the bonds issued to raise the rest of the money needed. The fact that part of the consideration was paid in cash and part in installments cannot change the nature of the transaction. The transaction is the same in essence as the acquisition of a right of way and the construction of a railroad by a single railroad company. The fact that, in this case, the acquisition was by the railroads as tenants in common does not change its character. If a single railroad acquired a right of way and agreed to pay for it partly in cash and partly in installments, such an agreement, absent default on its part, would give it just as substantial rights as would a contract fully executed by the cash and conveyance method. The fact that in this case the various tenant lines *joined* in agreeing to pay for the right of way and improvements does not alter the nature of the transaction.

Furthermore, it should be noted that, even where the Interstate Commerce Act gives the Interstate Commerce Commission express power to control the actions of carriers, it does not undertake to disturb underlying vested proprietary interests. For example, suppose a railroad company buys land for shops, either for cash or on installments, uses the shops a while and then abandons them with the authority of the Commission. (Cf. *State of Texas* v. *United States,* 292 U. S. 522.) Plainly it could not, on that account, with or without the authority of the Commission, repudiate the contract which it had made with the private property owner for the acquisition of the land, either by rescission of an executed contract or by repudiation of an executory one—

even though the expenditure for the useless land may remain a burden.

It may be that, at the present time, some of the roads use the facilities less than others. At the same time, Exhibit No. 2, attached to the petitioners' petition for mandamus (R. 60), does not fairly reflect either the differences or the result. This respondent's answer challenged the accuracy of the conclusions to be drawn from this exhibit and the basis upon which it was made (R. 185-187), and they, therefore, cannot be taken as admitted, as petitioners seem to assume. In the first place, there is no comon denominator by which the use of various zones can be accurately measured, one being on a car basis, some on a car mileage basis, and others on various different bases. Various efforts at rough approximations to secure averages could be made which would lead to different results. (R. 87.) The one used by petitioners happens to be merely a proportionate part of all operating expenses paid, measured in money—obviously not a scientifically accurate basis. Again, if the total payments made by the various proprietary companies, instead of merely the payments of interests and taxes, were taken into account, it would immediately be seen that the small users are not in the aggregate paying anything like the same amounts as the larger roads. For example, in 1932, the Kansas City Southern and the Chicago Great Western each paid less than $240,000 in the aggregate, including taxes and interest and joint operating expenses, and after deduction of net earnings of the Terminal Company distributed to the proprietary companies, while the Missouri Pacific and the Chicago, Rock Island & Pacific

paid approximately $500,000, and the Santa Fe approximately $670,000.

Again, while it may be true, as above stated, that some roads may now be making less use of the property than others, it does not follow that this will always be the case. In particular zones the record showed very wide fluctuations in the use made from time to time. Expansion and contraction of facilities, territory and trains may result in vast changes in the use. Each road has provided for its use facilities deemed adequate for its needs, facilities which it can command at any time when it wants them. Many of them it now uses, all of them it may use, and there is certainly no inequity in its paying for what it has provided for itself. It must be borne in mind that, as an undivided owner commanding an unlimited right to use the facilities, it is securing everything at cost, which an outsider could not do. Clearly, if the Terminal Company were in the position of an independent owner of this property, it would be absurd for it to agree to let the proprietary roads use the property on the terms provided in the Operating Agreement, that is, at actual cost to the Terminal Company. It would mean that the Terminal Company would have no source of profit and no return on its investment except such revenue as it might get from concessions in the station, switching revenues, etc. On the major part of its investment, it would be getting no return whatsoever. Plainly, if the parties were dealing at arm's length, and if the proprietary roads were not the joint owners of the enterprise, the Terminal Company would be entitled to

compensation for the use of its property commensurate with the investment. To this end it would either add to the various joint operating expenses paid by the roads a substantial sum for profit, or it would make each road a substantial standby charge for the right to use, and it would undoubtedly add an item for profit on the various services and repairs extended to the roads in the coach and engine yards. On the other hand, if its return were not arranged in this way, it would be entitled to charge a rental on the principles of eminent domain. This, as indicated in the report of the Commission in the M-K-T case, would necessarily result in requiring each road to pay an equal amount for what it acquires, that is, the joint and equal right to use the facilities. It could not require the Terminal Company to hold each and every part of its facilities ready for the use of such company whenever it chose to use it and then not pay anything unless at some particular time it happened to want to use it. As the Commission says:

> "Petitioner contends that the numerical basis is grossly inequitable, and that there is nothing in the language of the statute or the decisions of this Commission or the courts which prevents measuring the compensation by the extent of the use. *When analyzed, its position amounts to this, that respondent must hold its property in readiness at all times for the joint and equal use of petitioner, but that petitioner should be permitted to use the various zones if and when it may choose to do so, or not at all if it should so choose as to any particular zone, and to pay only for such use as it may actually make of the property.*
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> *The user basis* as a method for determining the portion of the interest charge to be imposed upon petitioner finds no support in the principles governing compensation in condemnation cases, *and in our opinion does not afford a just and reasonable basis.* We conclude that the numerical basis in the circumstances of this case affords the just and reasonable method to be applied." (Italics ours.) (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* 198 I. C. C. 4, 9, 11.)

The Commission also points out that, wherever the courts have had occasion to determine what a stranger should pay for the use of facilities, they have never adopted the so-called user basis. The Commission says:

> "We have been directed to no reported case in which it has been necessary for a court to determine the compensation to be paid for the joint and equal use by one company of another's facilities, where the court has not divided the return on the fair value of the property equally among the users, except the first report in *Oregon-Washington R. & Nav. Co.* v. *Spokane, P. & S. Ry. Co.,* 83 Oreg. 528, hereinafter *called the Portland Bridge case,* and there the departure from the ordinary rule was because the new company which came in acquired the right to use the property only for freight purposes whereas the carriers already occupying the property used it for both freight and passenger purposes." (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* 198 I. C. C. 4, 9.)

Among the cases supporting this statement of the Commission, we may mention the opinion of Mr. Justice Brewer, then circuit judge, in *Central Trust Company* v. *Wabash Railway Company,* 29 Fed. 546, 559, affirmed in

Joy v. *St. Louis*, 138 U. S. 1, and afterwards approved and interpreted in *St. Louis, etc., Railroad Company* v. *Wabash Railroad Company*, 217 U. S. 247; *Grand Avenue Railway Company* v. *People's Railway Company*, 132 Mo. 34; *Grand Avenue Railway Company* v. *Lindell*, 148 Mo. 637; *Grand Avenue Railway* v. *Citizens Railway Company*, 148 Mo. 665; *Toledo Consolidated Street Railway Company* v. *Toledo Electric Street Railway Company et al.*, 6 Ohio C. C. 362; *Oregon-Washington Company* v. *Spokane Company*, 163 Pac. 600, 603 (Oregon). See, also, *New York Central Railroad Company* v. *Central New England Railway Company*, 162 N. E. 324 (affirmed in *Central New England Railway Company* v. *Boston & Albany Railway Company*, 279 U. S. 415).

> "Under those circumstances it seems to me no more than fair that a new company which crowds itself into an equal access to such benefits and such privileges pay an equal share of the interest on the value of the property." (Brewer, C. J., in *Central Trust Company* v. *Wabash*, 29 Fed. 546, l. c. 559.)
>
> "In order to the enjoyment of these rights and privileges (that is, the equal rights and privileges relative to the passage of railroad trains and cars over the bridge), it is not necessary that defendant should transport thereover the same number or the same kind of trains and cars as plaintiff." (*Oregon-Washington Company* v. *Spokane Company*, 163 Pac. 600, l. c. 603.)
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> "'The probability that the appropriator will not exercise, or the fact that there is no present intention of exercising, to the full extent the rights acquired should not be considered in reduction of the damages, where there is nothing to prevent a full

exercise of such rights, since the presumption is that the appropriator will exercise his rights and use and enjoy the property taken to the full extent.'" (*Shell Pipe Line Company* v. *Woolfolk*, 331 Mo. 410, 414.)

We might here say a word about the basis of Commissioner Eastman's dissenting opinion, upon which counsel for petitioners appear to rely, and which the Court of Appeals must have treated as the foundation for the *obiter dicta* of that court. We do not refer to his conclusions of law, which are refuted elsewhere in this brief, but to his statements and conclusions of fact. He, like the petitioners, assumes an inequity, ignoring entirely the basis upon which the contract was made. He also mistakenly assumes that the so-called user basis is well-nigh universal in terminal contracts. The instances to which he refers were many of them shown in the record not to be comparable. As to others, the respondents did not have information.

Commissioner Eastman completely ignored the evidence in the case which showed that the unit or numerical basis was almost universal in the southwest and to a large extent in the middle west. For example, a few of the stations where the unit basis or a stock ownership basis obtained, as shown by the record, were Dallas, Texas; Galveston, Texas; Union Station, Chicago; Dearborn Station, Chicago; Joplin, Missouri; Joliet, Illinois; St. Joseph, Missouri; Atchison, Kansas; Wichita, Kansas; Pueblo, Colorado; Denver, Colorado; El Paso, Texas; and Houston, Texas.

We trust that what we have said is sufficient to remove from anyone's mind the idea that there is some in-

justice here crying aloud to Heaven and demanding a remedy at the expense of settled principles of statutory construction. As previously indicated, we do not feel that the question of the equity or inequity of the contract can be considered in a petition for mandamus, but we could not let the repeated artful allusions to this alleged inequity pass without comment.

There is one other practical consideration which should be referred to in this connection. While there has been considerable controversy among the carriers over the terms of the contract, these controversies are now virtually ready for final settlement and disposition were it not for the instant case. The Commission, after an extended hearing covering values, uses and all other pertinent facts, has determined the fair compensation to be paid by the M-K-T and has repudiated the very basis which furnished the excuse for these petitioners coming into the M-K-T case. The M-K-T has decided that it would be to its advantage to become a proprietary company with all of the rights, privileges and joint control which the proprietary companies have, rather than, as a tenant, to pay a fair return on the particular facilities which it has chosen to use—the report of the Commission finding that this fair compensation was a sum in excess of what the M-K-T would pay as a proprietary company. The other roads which had potential controversies are likewise ready to end them, leaving only these petitioners (and possibly, though not certainly, the Alton Railroad Company, whose time for electing to adopt or reject executory contracts of its predecessor company has not yet expired) unsatisfied.

Should these petitioners, after having waited for more than five years following dismissal of their interventions before filing petitions for rehearing, and after waiting more than seven years before taking any action in court, be permitted to disrupt an otherwise harmonious settlement of the controversy? Are they not guilty of laches? Do not their petitions in reality raise a moot question, since the main case in which the interventions were filed has been disposed of?

II.

Petitioners Must Fail for Other Reasons.

The objection that the intervening petitions unduly broadened the issues was set up in the motions to strike (R. 74, 75), and was a sufficient ground for their dismissal by the Commission, even though the Commission did not put the dismissal on this ground. Rule II (1) 3 of the Commission is in part as follows:

> "Leave [to intervene] will not be granted except on allegations reasonably pertinent to the issues already presented and which do not unduly broaden them."

Clearly these interventions were not germane to the original case. The original case was a proceeding under Paragraph (4) of Section 3 to determine just compensation to be paid by a stranger to the property for acquiring the use of that property. The petitioners in their interventions undertook to set up a case of discrimination as between *owning carriers* under other provisions of the Interstate Commerce Act. Conceding, for the sake of argument, that the allegations were proper for

consideration in an independent proceeding filed by the petitioners, such controversies were not germane to the sole issue before the Commission in the M-K-T case, that is, whether it was in the public interest that the M-K-T should use these facilities and, if so, what was the compensation to be paid therefor by it.

Furthermore, this is a moot case, at least as to the Chicago Great Western. Since the Commission has now decided the proceeding brought by the M-K-T, and has resolved the M-K-T's main contention against it, it ought not to be obliged to take charge of collateral issues which have no relation to the main case. Such is the situation of the Kansas City Southern. As to the Chicago Great Western, the report and order of the Commission have even more clearly made its intervention moot. The relief which it prayed was expressly made contingent upon the Commission fixing the compensation to be paid by the M-K-T in an amount less than the amounts which it would be required to pay under the Operating Agreement.

Since the Commission has fixed the amount to be paid by the M-K-T at a greater instead of a less sum (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company*, 198 I. C. C. 4, 31), and since the M-K-T has signified its intention to become a party to the Operating Agreement, abiding by all of its terms and conditions, the basis for the Chicago Great Western's intervention falls. Again, should these parties be entitled to the extraordinary relief of mandamus when they have slept on their rights since 1925, almost ten years? The excuses for the delay offered by the petitioners are not sufficient. If they were serious in their contentions, they should

have proceeded with their application for mandamus promptly, so that (if the issues were really germane to the case) the Commission could have reached one decision which would dispose of the case. Are they not guilty of laches which will preclude them from relief even if they were otherwise entitled to it? See *United States ex rel. Arant* v. *Lane*, 249 U. S. 367, where the Court held laches to be applicable in a mandamus case.

III.

The Court of Appeals Correctly Decided That Mandamus Would Not Lie in Any Event.

The Court of Appeals held that the Commission, having determined, after a hearing and after construction by it of statutes, which, viewed in the light most favorable to petitioners, were not free from doubt, that it could not grant the relief prayed, was not subject to control by mandamus. (R. 200, 71 F. (2d) 341.)

This Court said in *Interstate Commerce Commission* v. *United States*, 280 U. S. 52, l. c. 71:

> "In what situations, if any, action of the Interstate Commerce Commission may be controlled or corrected by mandamus need not now be considered, because it is apparent that there is here no meritorious basis for exerting such power, even if found to exist."

It is also unnecessary to consider this question here. We discuss it, however, because it was decided by the Court of Appeals and it is stressed by petitioners.

It has been settled by this Court that, where an administrative body (especially one like the Interstate

Commerce Commission, exercising quasi-judicial functions) is called upon to construe a statute, the construction of which is not free from doubt, whether such construction relates to the extent of its powers or only to their application, it is not subject to control by mandamus with reference to the action involved in such construction.

> "Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes, the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." (*Wilbur* v. *United States,* 281 U. S. 206, l. c. 218.)
>
> "In making those decisions the Commission would necessarily act in a *quasi* judicial capacity. If it misconstrued the term 'deficit,' it committed an error; but it did not transcend its jurisdiction." (*Butte, etc., Ry. Co.* v. *United States,* 54 Sup. Ct. Rep. 108, 110; 290 U. S. 127, l. c. 136.)

It is otherwise where the construction of the statute has been settled by repeated decisions of this court (*Interstate Commerce Commission* v. *Humboldt Steamship Company,* 224 U. S. 474; *United States ex rel. Louisville Cement Company* v. *Interstate Commerce Commission,* 246 U. S. 638), or where the bone of contention is not the construction of the statute, but the practicability of complying with it. (*United States ex rel. Kansas City Southern Railway Company* v. *Interstate Commerce Commission,* 252 U. S. 178.)

This court's decision in *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. R. Co.*, 287 U. S. 178, illustrates the distinction. In the Kansas City Southern case the statutory mandate was so clear as not to admit of controversy. In the New Haven case the "duty is not plainly prescribed, but is to be gathered from statutes of uncertain meaning" (l. c. 204), and accordingly mandamus was refused. Compare, also, *Ex parte Harding*, 219 U. S. 363, and *General Investment Company* v. *New York Central R. R. Co.*, 271 U. S. 228.

Here the Commission heard all the evidence offered by petitioners, gave it careful consideration (R. 90), accorded them a full hearing, including briefs and argument, construed the statutes relied upon (which obviously contain no unequivocal mandate) and decided that the Commission could not, under the statutes, grant the relief prayed. At page 15 of petitioners' brief it is stated that, although the Commission held hearings and made a large record, "that record was made to determine the issues raised by the petition of the Missouri-Kansas-Texas Railroad and not to determine the issues raised by petitioners." Counsel doubtless made this statement from memory, not having before them when they wrote the brief the record made before the Commission. As a matter of fact, the Commission did not exclude any testimony whatever on jurisdictional grounds, but heard whatever was offered at the hearing by any intervener. For example, the following appears at page 42 of the record before the Commission:

"Exam. Barclay: Mr. Sawyer and gentlemen on the other side, Mr. Towner desires to put in some testimony in support of the Great Western's intervention, and before you start to cross examine, if it is agreeable, we will have him do that and then cross examine Mr. Felton.

Mr. Towner: Mr. Felton has to leave today and it will be a great convenience to me if you will let me put in these statements here, if that is agreeable to the examiner and the other side."

Mr. Towner then proceeded to examine Mr. Felton, who had first been put on the stand by the M-K-T.

Again, for example, at page 394 of the record, it appears that Mr. L. J. Hensley, Comptroller for the Kansas City Southern, was called as a witness and was examined by Mr. A. F. Smith, Assistant General Solicitor for the Kansas City Southern. As appears from the Commission's own report, there were witnesses on the stand representing various interveners. (R. 90.) In some respects the interveners were making common cause with the M-K-T, and in some cases it might be difficult to tell exactly on whose behalf the witness was testifying.

We have shown that the Commission's construction of the statutes was correct. The Court of Appeals evidently so thought. (R. 208, 209, 71 F. (2d) 336, 340.) Certainly no decision of this Court has determined otherwise, and clearly the construction of the statutes (on the assumption that there is any ground at all for petitioners' claimed construction) is not free from doubt. Plainly, therefore, the Commission's action cannot be controlled by mandamus.

But, petitioners say, there is a difference between the construction of statutes affecting the Commission's power to act and the construction of statutes encountered in the current application of its powers.

This distinction is illusory.

Petitioners confuse jurisdiction and power. The Commission here did not deny that it had jurisdiction to correct discriminations by virtue of Paragraphs (1) and (3) of Section 3, and to requisition the use of the terminals of one carrier for another by virtue of Paragraph (4) of Section 3. On the contrary it correctly decided that it must determine what kind of discriminations the Commission was directed or permitted to correct by the terms of Paragraphs (1) and (3) and for what carriers Paragraph (4) provided relief. It then proceeded to determine both questions.

Where a statute is construed by an administrative body, such as the Commission, a determination of its own power is almost necessarily wrapped up in the construction of the statute. When the Commission construed the word "deficit" in the Transportation Act of 1920, it necessarily determined the extent of its own power in dealing with the particular carrier. (*Butte, etc., Ry. Co.* v. *United States,* 290 U. S. 127.) When Secretary Wilbur decided that the Indian annuities provided by Congress depended on tribal relationships, he necessarily determined the extent of his own power in dealing with the particular Indians. (*Wilbur* v. *United States,* 281 U. S. 206.)

So far as Paragraph (4) is concerned, the Commission's decision was based, not on a lack of power over appropriation proceedings, but on the petitioners not being within the class for which the statutes provide relief. When the district court, in *General Investment Company* v. *New York Central R. R.*, 271 U. S. 228, dismissed the plaintiff's suit on the ground that plaintiff was not one of the class of persons for whom the Sherman Act and the Clayton Act provide relief, its decision was a decision on the merits (as this Court expressly held). As such, it is on all fours with the Commission's decision here that petitioners are not of the class of railroad companies for which Paragraph (4) of Section 3 provides relief.

> "Under this legislation, whether a claimant seeking 'relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction.'" (*Butte A. & P. Railway Company* v. *United States*, 290 U. S. 127, 142.)

Furthermore, the Commission did not stop with construing its own powers. It expressly held that, on the assumption that the Commission did have full power, the petitioners were not entitled to relief on the facts. (R. 114.) The Commission said:

> "Assuming, without now deciding, that the provisions of Paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon

its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of Paragraph (3)."

Counsel for petitioners argue that this language shows that the Commission did not decide the issue instead of showing, as the language itself indicates, that the Commission did decide the issue. The Commission did just what the courts frequently do, considered the question of its powers and of the merits together, held that it did not have power, but that, if it did have power, plaintiff could not recover anyway. The Commission itself has done the same thing before, perhaps often. For example, in *Oklahoma-Arkansas Telephone Company* v. *Southwestern Bell Telephone Company*, 183 I. C. C. 771, to which we have already referred, the Commission says at page 774:

> "But conceding our jurisdiction for the moment, we cannot find for complainant upon the merits."

In the instant case, it is difficult to see how the decision upon the merits can be any the less decisive—merely because the Commission did not think it had the

power to grant the relief even if it had not found against the petitioners on the merits.

The powers attributed to the Commission by the petitioners fall into three categories—(1) a power to remove discriminations under Paragraphs (1) and (3) of Section 3 of the Act, (2) a power of eminent domain under Paragraph (4) of Section 3, (3) vague and indefinite powers to remove "burdens" under unnamed sections of the Act.

When analyzed, the Commission's action amounts to this:

(1) As to Paragraphs (1) and (3) of Section 3, it held that interest and tax payments of the proprietary companies were not the kind of charges contemplated by either paragraph of Section 3 and that neither Paragraph (1) nor Paragraph (3) of Section 3 had any application to them; that the contract and the proprietary relationships out of which it grew were a complete defense to any charge of unjust discrimination and that on the facts, no undue prejudice or preference or unjust discrimination was shown. (R. 97.)

(2) As to Paragraph (4) of Section 3, it held that the petitioners were not of the class of parties for whom that paragraph provided relief (R. 95), and, as to the vague undefined powers referred to, it held that no section of the Act could be found whose language the Commission could interpret to confer such powers. (R. 96.)

In other words, the Commission considered the questions and the evidence presented under Paragraphs (1) and (3) of Section 3, decided that no unjust discrimination was shown, and further decided that the contract and the

other relationships with the carriers were not of the kind to which Section 3 applied and precluded any finding of unjust discrimination by the carrier *as a carrier.* It decided that, although the Commission had jurisdiction of the parties, and generally of proceedings under Paragraph (4), the petitioners, in view of their contracts and relations with the Terminal Company and its property and other facts in the record, did not have the requisite standing to maintain a proceeding under Paragraph (4) because the Act did not authorize the Commission to proceed at the instance of carriers in the situation of petitioners.

(3) It decided, as to Section 15 (a) and the other unnamed sections of the Act, that they did not confer upon the Commission any powers to readjust the payments to be made by the users of joint facilities. The Commission could find no express mandate, or even implied permission, in these provisions, and no one else can.

The Commission, so far as the issues under the various provisions of Section 3 were concerned, thus in the exercise of its general jurisdiction to hear and decide under both Paragraphs (1) and (3) and Paragraph (4); (a) decided that it lacked power under Paragraphs (1), (3) and (4) to set aside respondents' contract; (b) decided that petitioners were not of the class for which relief was provided by Paragraph (4); (c) decided that, even if the Commission had full power to set aside the contract, no discrimination of the kind contemplated by Paragraphs (1) and (3) was shown by the evidence; and (d) for these reasons, *i. e., on the merits,* dismissed the intervening

petitions of these petitioners. The Commission's answer, in substance, so alleged. (R. 161.)

Plainly mandamus does not lie to compel the Commission to decide otherwise.

IV.

Conclusion.

The consequences of the Commission's assuming power to grant the relief prayed by the petitioners would be widespread. It is a matter of common knowledge that the railroads of the country are parties, not only to numerous joint facility agreements, but to leases and trackage agreements by the thousands, many of them for long terms, and involving property interests running into hundreds of millions of dollars. Doubtless, every railroad company would like to improve upon the terms and conditions of some of these agreements. To open the door wide enough for petitioners to squeeze through would let in a swarm of controversies.

Many of these agreements date back for years and have been amended and supplemented from time to time. The result is an intertwining of property rights, estoppels, obligations and mutual concessions constituting such a complicated structure that it would be difficult, if not impossible, for a human tribunal to so disentangle them as to arrive at the present true equities of the situation. More serious still is the disruption of contract and property arrangements and settlements of long standing and the complete destruction of all confidence in the written word. A contract would become nothing more than a

written memorandum of the intentions, hopes and desires of the parties at the moment. In the great case of *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52, this Court has recognized that the practical consequences should be taken into account in arriving at the intent of Congress in the use of general language in the Interstate Commerce Act. The Court said (l. c. 68, 69):

> "The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, that power we should expect to find in congressional legislation. Such authority, if conferred in Los Angeles, would have application to all interstate railroad junctions, including the numerous large cities of the country, with their residential, commercial, shopping, and municipal centers now fixed and established with relation to existing terminals. It would become a statute of the widest effect and would enter into the welfare of every part of the country. Various interests would be vitally affected by the substitution of a union station for the present terminals. A selection of its site from the standpoint of a city might greatly affect property values and likewise local transportation systems. The exercise of such power would compel the carriers to abandon existing terminals, to acquire new land and rights of way and enter upon new construction, to abandon large tracts and to sell territory of the same extent as no longer necessary for the use of the carriers.
>
> There would have to be tribunals to apportion the expenditures and cost as between the carriers. A proper statute would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to have been left to be implied from varied regulatory provisions of uncertain scope."

This case of *Interstate Commerce Commission* v. *Los Angeles, supra,* and the case of *Interstate Commerce Commission* v. *Oregon-Washington Railroad Company,* 288 U. S. 14, are conclusive of this case.

Another practical consideration of moment is the fact pointed out in our statement of the case that the long drawn out controversies relating to the M-K-T litigation are nearing an end by reason of the M-K-T's decision to become a party to the Operating Agreement and Stock Trust Agreement and the election of receivers, trustees and successors of other companies to adopt them. Only this litigation of the petitioners disturbs the present harmonious relationships.

We respectfully submit that the Commission was right in dismissing the intervening petitions, that, in any event, the Supreme Court of the District of Columbia rightly denied the extraordinary remedy of mandamus, that the Circuit Court of Appeals of the District of Columbia rightly affirmed the judgment of the lower court and that the judgment below should now be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 234.

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONERS,

VS.

INTERSTATE COMMERCE COMMISSION; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; KANSAS CITY TERMINAL RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; AND MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENTS.

BRIEF OF RESPONDENTS, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; AND MISSOURI PACIFIC RAILROAD COMPANY.

STATEMENT.

The Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, petitioners

herein, are two of twelve proprietary companies using the facilities of the Kansas City Terminal Railway Company. The proprietors incorporated the Terminal Company for the construction and operation of the facilities, contracting to share equally in payments of interest and taxes and to divide operating expenses in proportion to their respective uses. The petitioners, purporting to proceed under Section 3 (1), (3) and (4), Section 15a and under other somewhat vaguely defined provisions of the Interstate Commerce Act, complained to the Commission that their payments of interest and taxes on the numerical basis were unlawfully discriminatory and burdensome, and asked the Commission to prescribe more equitable terms. (R. 63.) The Commission entertained the complaint, heard testimony, but held in 1925 that no case had been made out for relief under the Act, 104 I. C. C. 203, 225. (R. 69, 97.) In 1933 petitioners, conceiving that this amounted to an improper refusal of jurisdiction, brought mandamus. The Supreme Court of the District of Columbia dismissed the petition, and the Court of Appeals affirmed, 71 F. (2d) 336. (R. 199.) This Court granted certiorari.

This brief will be largely devoted to the question whether the Commission has the authority claimed by petitioners, an authority disclaimed by the Commission itself, and based upon no specific congressional grant of power but upon general language in the statute, chiefly the passages prohibiting unjust discrimination in rates, fares and charges and in the interchange of traffic among connecting lines.

The respondents, on whose behalf this brief is filed, have consistently opposed the claim of petitioners, both in the proceedings before the Commission and in these proceedings. Their opposition is not due to the mere fact that in this particular case their burdens of cost would be increased if petitioners' claim were to prevail. The respondent Burlington would not be greatly affected one way or the other, and the Union Pacific would gain. The stand of these respondents is more deeply rooted in their opposition to the destruction of vested contract rights of a proprietary nature through the exercise of administrative discretion, whenever a contract is regarded as discriminatory or is supposed to be burdensome on interstate commerce, or whenever it is thought to have been improvidently entered into.

FAR-REACHING CONSEQUENCES OF PETITIONERS' CONTENTIONS.

The surface singleness and simplicity of the petitioners' plea disappear when its reality and ultimate significance are appreciated. They seem to be asking only that the Commission be required to take jurisdiction of the case for the purpose of substituting the user rule for the unit rule in the apportionment of interest and taxes. But the Commission will not be able to stop with an examination of a single term of the agreements but will be required to examine all of the numerous intertwining and mutually dependent clauses of a comprehensive series of agreements; in short, will be compelled

in practical if not in legal effect to rewrite the contract for the parties. Full justice and equity would so require. Moreover, before being able fully to comprehend the reason for a particular term, the Commission would have to ascertain its origin, would be compelled to look into the prior relationship of the parties, to the position they occupied, to the property and property rights which they mutually surrendered for the common enterprise. Discrimination might appear on the surface with respect to one term, only to disappear when all other terms were taken into consideration. We most emphatically deny that the facts are undisputed and deny that the payments which petitioners must make are inequitable and constitute prejudice and discrimination. (Plf's. Brief, p. 13, Par. d.)

If the Commission has the sweeping powers which it is asserted to have with respect to the joint terminals and union stations, the Commission will have, under the same principles and the same interpretation of the Act, like power with respect to joint trackage agreements of which there are many thousands in existence throughout the United States. Indeed, in such event it is difficult to imagine a single contract of a carrier with anybody for any purpose which may not be subjected to the unlimited and unfettered revisory power of the Commission. Carriers would no longer be assured of a right to freely contract with respect to their property, which is still their own though devoted to a public use. In short, carriers would be entirely deprived of the ability to make binding contracts.

RESPONDENTS ADOPT BRIEF OF KANSAS CITY TERMINAL COMPANY.

Notwithstanding the deep concern and vital interest of these respondents in the issue presented by this case, they do not deem it necessary to file in this court an elaborate brief, because the brief of the respondent, Kansas City Terminal, has fully covered the points involved. What these respondents would say, therefore, would be largely repetitive. We are, therefore, content to adopt as our own the brief of the Terminal and with confidence to rely upon the principles of law therein set forth and the arguments therein advanced.

LOS ANGELES UNION DEPOT CASE CONTROLLING.

Moreover, we have implicit confidence in the fact that if the Supreme Court in the *Los Angeles Union Depot Case,* 280 U. S. 52, could not find authority in the Interstate Commerce Act for the Commission to order a new station to be built, it will find even greater difficulty in locating and defining the language which authorizes the Commission to rearrange and readjust the terms under which a joint terminal has already been built. We, also, have confidence arising from the fact that this Court has uniformly declined to read into uncertain, indefinite and general language, in the Interstate Commerce Act, an intent upon the part of Congress to confer a new, revolutionary and specific power. *Los Angeles Union Depot Case, supra;*

Interstate Commerce Commission v. *Oregon-Washington R. and Navigation Co.*, 288 U. S. 14; *I. C. C.* v. *Cincinnati, etc., R. Co.*, 167 U. S. 479; *Davis* v. *Pringle*, 268 U. S. 315, 318. This Court has not conceived, to paraphrase the language of Mr. Justice Holmes in the case last cited, that Congress would have intended to smuggle in a provision to destroy solemn contracts of a proprietary nature by muffled words.

LACK OF COMMISSION POWER CLEARER HERE THAN IN LOS ANGELES CASE.

The Court will find itself confronted with a greater difficulty in finding statutory authority in the present case, not only for the reasons which determined it in the Los Angeles case, nor alone because of the greater difficulties incident to the virtual revision of the complex terms of a contract already executed, but also because it will have to take into consideration certain positive language which Congress has used in Paragraph 15 of Section 1 and in Paragraph 4 of Section 3. In those two sections Congress has affirmatively sanctioned whatever agreements railroads may themselves make with respect to their joint facilities, and it is only in case the parties have not agreed that the Commission is authorized to take definite, positive and compulsory direction. The Congress in these two sections has sanctioned private agreement in respect to the very subject matter now under consideration, and has done so without limitation or exception, or provision for Commission review.

We are thus able to point out to the Court a very striking contrast in one particular between this case and the Los Angeles case, a particular which makes this case one in which it is much more difficult to find statutory authority for the relief sought. In the Los Angeles case the Court had to consider only certain broad and vague terms found in the Act and to decide that the power to order a new depot was not comprehended by them. In the present case it will be found that Congress has directed its thought to the very subject of compensation for the use of joint facilities and has affirmatively acted with respect thereto, but it has definitely limited its action in no uncertain terms to two situations and has thereby negatived an intent to deal with any other situations than those which it has explicitly covered. Our point will be made clear by reference to Paragraph 15 of Section 1 and Paragraph 4 of Section 3.

Paragraph 15 of Section 1 grants to the Commission power and authority (c) "to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest and upon *such terms as the carriers may agree upon,* or in the event of their disagreement, as the Commission may after its hearing find to be just and reasonable."

Thus in an emergency Congress has conferred upon the Commission power to compel the joint use of terminals and to prescribe the terms and conditions of such joint use, but only in the event that the carriers have not agreed among themselves.

And likewise in Paragraph 4 of Section 3, Congress has conferred upon the Commission power and authority to require permanent use of terminal facilities and in this respect has enacted that the Commission "shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, *on such terms and for such compensation as the carriers affected may agree upon,* or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

Here again Congress has in unmistakable terms limited its grant of power to two situations and contingencies (1) to the situation of an outside carrier not then in the use and exercise of the facilities and (2) to fix the terms of compensation only in case the parties are unable to agree. It is further to be noticed that in granting this power and authority to the Commission it took into account the Fifth Amendment to the Constitution and provided that in the event the parties did not agree, the Commission should fix the reasonable terms and conditions upon the principles applicable to a condemnation case.

THE SO-CALLED "REVOLUTIONARY" GRANTS OF POWER.

The language of a general nature, prohibiting unjust discrimination and undue prejudice which counsel for

petitioners point specifically to and found in Paragraphs 1 and 3 of Section 3, has been in the statute since 1887. For the Court now to construe this language as petitioners desire, would be for the Court to ascribe to the Congress an intent, back in 1887, to plunge the carriers at once into an extreme form of regulation, to an extent not even ventured in the so-called "revolutionary" changes introduced by the Transportation Act of 1920.

Much has been said in the brief of petitioners of the general powers of the Commission with respect to the regulation of carriers, and they have stressed with particular emphasis the "revolutionary" changes made by the Transportation Act of 1920. It is significant that the most revolutionary changes effected by that Act related to (a) extensions and abandonments of lines (Paragraph 18 of Section 1) (b) to the acquisition of new lines and to consolidation (Section 5) and (c) to issuance of securities (Section 20a). In all of these cases this Court has recognized that the power conferred on the Commission is only a power to permit or authorize and not a mandatory power; and when, as in other instances, mandatory power has been conferred by the Transportation Act, such as in Paragraph (4) of Section 3 relating to joint facilities, and the division of earnings (Section 15), the power has been conferred in no uncertain terms. It will also be noted that in these instances the Congress has provided elaborate and detailed machinery for carrying out its will.

PETITIONERS' CONSTRUCTION OF ACT WOULD RENDER IT UNCONSTITUTIONAL.

If the provisions of the Act relied upon by petitioners were to be construed as empowering the Commission to strike down joint facility contracts, they would be unconstitutional. At the very least such a construction would raise grave doubts of constitutionality, and for that reason should be avoided to save the validity of the statute, as it plainly may be avoided in view of the undoubted fact that the language is fairly open to the interpretation that it does not give the claimed power.

If a railroad desired a terminal property of another, it could not seriously be contended that Congress could confer on the Commission power to order the taking of title, possession, or use without providing for due process and compensation. If a railroad buys and pays for a terminal property, and then finds it has made an improvident bargain, could Congress empower the Commission to order rescission and restitution? If a railroad owning a terminal property mortgages it for money for improvements, and then finds that the outlay has been injudicious, could Congress or Commission cancel the bonds because forsooth they might be regarded as a burden on an interstate carrier?

The facts with respect to the Kansas City Terminal are more complex than in the illustrations given, but the same elements are present and the same principles apply.

It is only when all of the complications are understood and all of the elements are appreciated that the

real merits of the situation may fairly be judged. It is an utterly misleading over-simplification of the problem to regard it as presenting merely the question of what is a fair rental charge for the use by one or two railroads of the property of another. Each of the twelve companies is a joint proprietor, as well as a joint user, of the facilities. The Terminal Company is but a corporate instrumentality of the proprietors. (R. 85-87.) What gave it life were the compromises, concessions, contributions of property, and mutual covenants of its founders. (R. 89-90.) Those covenants keep it alive today. They include not only the undertaking of the joint proprietors to share equally the expenses of interest and taxes, but also to pay an equal share of the principal of the bonds at their maturity in 1960, as well as the obligation to make renewals and repairs. (R. 85.) The current payments of taxes and interest are in consideration not alone of the current use of the Terminal but of the original concessions, compromises, contributions of property, and agreement to go into the enterprise, with all of its present sacrifices and future liabilities, on the part of some or all of the joint proprietors, and attach to and are inherent in the ownership of the property.

An example of the compromises and concessions is found in the location of the Union Station. Three sites were originally considered. Two of them were close to the line of the Burlington, and one or the other of them was greatly desired by it for reasons of economy and convenience. In the interest of the whole project, however, it finally agreed on the present location, although

this meant greater operating outlays and larger payments to the Terminal Company for a more extensive use of its trackage in reaching the Union Station. Other examples might be given if time and space were available.

Some of the roads made contributions of property of which the outstanding example will be given. This was the contribution by the Santa Fe, the Frisco, and the St. Paul of the property of the Kansas City Belt Railway Company. This property had been developed in the early eighties when real estate values were low, and its line embracing 63.8 miles of all tracks and serving over 150 industries, including the great packing houses and elevators, extended through the city from east to west. Its stock was owned by the Santa Fe with 2,200 shares, the Frisco with 1,100 shares, and the St. Paul with 550 shares. The St. Paul and the Santa Fe had trackage right agreements over the line, made in 1887 and 1888, respectively, to run in each instance for 99 years, while the Rock Island had a like right for a shorter term. The owners agreed by contract of 1906 to turn over this property to the new enterprise. On June 12, 1908, a contract was made between the Terminal Company and each one of the ten original proprietary companies by which the contract of May 21, 1906, was cancelled, and it was agreed that all of the stock of the Belt Company should be transferred to the new Terminal Company. The considerations named were the same as in the contract of 1906, namely, (1) the book value of the stock of $787,985, which was much less than its

real value, the uncontradicted evidence before the Commission showing a bare land value of over $7,000,000, not to mention the worth of franchises, structures, and equipment, as compared with the total cost of the property of about $3,500,000 to the new Terminal Company after taking into account both the cost of the stock and the bonded indebtedness assumed; (2) the building of the new union depot; (3) the execution of contracts by all of the parties for the use of the Union Station; (4) an agreement by the proprietary companies that they would each pay one-tenth of the fixed charges on the new terminal property, including taxes, and divide the operating and maintenance expenses on a wheelage basis; (5) an agreement by the Terminal Company to permit the use of the new facilities by all of the proprietary companies; (6) the provision of a complete double-track belt around the north and west sides of Kansas City for the use of all the proprietary companies; (7) the extension in perpetuity (later cut down to 250 years in the Operating Agreement) of the trackage rights of the Santa Fe, the St. Paul, and the Rock Island over the lines of the old Belt Company; and (8) a waiver by the Santa Fe, St. Paul, and Rock Island of their preferential operating rights over the Belt line. The petitioners became bound by this contract when later they joined in the enterprise.

The legal and equitable effect of these contributions is largely ignored by the petitioners. They have confined themselves rather weakly to the suggestion that the cash payment made for the stock of the Belt Com-

pany represented its full worth, and that the appraisal of its lands at over $7,000,000 is exorbitant. But if the cash payment were the only consideration of the contract, why were some seven additional considerations named by the parties when they drew the contract? If the appraisal of the land were at an exorbitant figure, why was no attempt made to contradict it? Do the petitioners really suppose that these lands, including a continuous right of way through the heart of Kansas City, were worth in 1908 no more than their book cost in the 1880's, and that they had not undergone a tremendous appreciation with the growth of the city in size, population, and wealth in the intervening period?

The former owners and users of the Belt line gave up a property of great value and strategic importance. The Santa Fe, the largest owner of the Belt property, made the largest use of it since it afforded this carrier its only line for through traffic across Kansas City. Today the fact that the old Belt line route is employed by the Santa Fe for its through passenger and freight business makes it the largest user of the terminal property; but the Santa Fe paid a partial *quid pro quo* for this use by its original contribution.

The Operating Agreement itself is much more than a contract between the Terminal Company and the tenant lines for the use of the property. In this instrument, entered into on June 12, 1909, between the ten proprietary lines of the Terminal Company and the Illinois Trust and Savings Bank, as trustee, the facts were set forth respecting the acquisition by the Terminal Com-

pany of certain properties, including those of the Kansas City Belt Railway Company. (R. 15.) It was agreed that each proprietary line *in consideration of the acquisition of the necessary lands, and the construction of the Union Station and other facilities,* and the grant by the Terminal Company of the use of all of such facilities by each of such lines, would pay in equal shares (1) interest on the bonds of the Terminal Company, (2) the principal of such bonds at maturity, and (3) taxes. (R. 16, 17, 20.) The length of the contract was fixed at two hundred years. (R. 17.)

On the same day, the Terminal Company and the ten proprietary lines entered into a stock trust agreement with the Pioneer Trust Company of Kansas City providing for the transfer of the shares of the capital stock in the Terminal Company owned by the proprietary lines to the trustee for the purpose of carrying out the provisions of the Operating Agreement, and as security for their performance. (R. 120.)

On June 7, 1909, the council of Kansas City, Missouri, granted a franchise to the Terminal Company for two hundred years conditioned upon the operation of passenger trains of the proprietary companies arriving in or departing from Kansas City into the Union Station. The Terminal Company and the proprietary companies, as a further condition, were required to agree to the construction of the Union Station on its present site, and to make necessary repairs and renewals from time to time. (R. 76, 81-85.)

The petitioners subsequently became parties to the Operating Agreement and stock trust agreement, and

they filed an acceptance of the terms of the city ordinance granting the franchise.

The Operating Agreement and supplemental operating agreements, as well as the stock trust agreement and supplemental stock trust agreement, are deposited with the trustee as security for $50,000,000 of bonds of the Terminal Company. (R. 39, 50, 121-122.)

This whole series of contracts, and the franchise granted by Kansas City, all requiring an equal division of interest and taxes, were entered into for what the parties at the time obviously regarded as satisfactory considerations. Petitioners say the Interstate Commerce Act requires the striking down of these solemn contracts as discriminatory, burdensome and improvident. They are unable, however, to point to any specific provision in the statute evincing a plainly expressed intention on the part of Congress to regulate, revise, or in any way impair the obligation of such contracts. They ask this Court to raise up the power by a remote inference from general language which has always been understood to be confined in its application to discrimination in charges for the transportation by railroads of persons and property of the general public. To so construe the statute, we submit, would plainly constitute a taking of the vested property rights of the respondents in the agreements affecting the proprietorship and use of this joint terminal facility. At the very least, such a construction should be viewed with disfavor to avoid the serious constitutional questions it would raise.

CONGRESS DID NOT INTEND TO UNDERTAKE COMPREHENSIVE REGULATION OF JOINT FACILITIES.

The joint terminal facilities owned and operated by the railroads in many cities throughout the country involve many complexities with respect to property interests, as well as contractual and franchise obligations. If they are to be regulated or readjusted by the federal government, it is quite evident that the very nature of the problem requires many special provisions and much detailed machinery. "A proper statute," this Court said with respect to an analogous situation in the *Los Angeles Union Depot Case, supra,* at page 69, "would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to have been left to be implied from varied regulatory provisions of uncertain scope." Here, as there, the absence of plain terms, appropriate directions, and adequate machinery is eloquent witness of utter lack of any intention on the part of Congress to undertake far-reaching regulation.

PETITIONERS' CONTENTIONS WITH RESPECT TO EQUITIES.

The petitioners urge with great insistence that the unit basis of dividing the fixed charges of the Terminal in interest and taxes, by which each company using its facilities pays an equal part of such expenses, is grossly unfair and inequitable. They seek to substitute the user

basis, under which each participating carrier would pay interest and taxes in the proportion that its use bears to the total use actually made of the property by all of the lines. In their brief they cite examples of what they regard as proof of the glaring injustice of dividing interest and taxes on the unit or numerical basis. They say in 1932 the Chicago Great Western, making 2.61 per cent of the total use, was nevertheless required to pay 8-1/3 per cent of the interest and taxes, whereas the Santa Fe, making 26.05 per cent of the total use, was required to pay only the same 8-1/3 per cent of those items. By this means, it is said, the Chicago Great Western paid $130,779.39 for something it did not receive, whereas the Santa Fe received $404,351.76 worth of service for which it paid nothing.

This argument has a surface plausibility. The contention that each line should make current payments in accordance with the proportion of use which it enjoys has at first a logical ring.

DEFECTS IN PETITIONERS' CONTENTIONS.

But this facile argument is unsound. Its premises are fatally defective; they involve an assumption of simplicity of situation which fails to correspond to the reality.

The argument ignores the inequality of the concessions and contributions originally made by the proprietary lines.

It ignores the fact that the large users already pay a greater proportion of the total costs.

It ignores the justice of requiring proprietors of a joint facility to pay on the basis of capacity provided rather than fluctuating use made of the facilities, of which there is an unlimited right of user.

ORIGINAL CONTRIBUTIONS UNEQUAL.

The mere fact that the larger users make a greater use of the Terminal than the Great Western does not mean that they are getting something for nothing, when they pay no more than the Great Western on account of interest and taxes. There have been two classes of payments made to the Terminal for the service it furnishes; (1) the original contributions, and (2) the current payments. Both of these must be taken into account. It is grossly inaccurate to disregard either of them. The Santa Fe, to adopt the illustration selected by the petitioners, originally made a considerable capital contribution, whereas it is not so much as intimated that the petitioners made any at all. There is no showing that the total contributions by the larger users fail to be commensurate with the extent of their enjoyment of the facilities.

The petitioners are unfortunate for another reason in singling out the Santa Fe as a horrible example of getting something for nothing. They forget that the extensive use of the terminal by the Santa Fe is largely because it runs its trains through Kansas City over the old Belt line route, and that its right to do so flows not alone from the Operating Agreement, but from the trackage rights over the Belt line it reserved and which

by the Operating Agreement were extended for a period of two hundred and fifty years, when it parted with its other interests in the Belt property.

LARGER USERS NOW PAYING A GREATER PROPORTION OF TERMINAL COST.

The petitioners, in stressing the disparity between their proportion of actual present use of the facilities and the proportion of their outlay for interest and taxes, as compared with those of the larger users, overlook the fact that when all of the costs of the Terminal are considered, they pay much less than the larger users. For instance, the Chicago Great Western in 1932 bore 5.77 per cent of all costs, and the Kansas City Southern, 5.61 per cent, whereas the Santa Fe bore 16.27 per cent, the Rock Island, 12.42 per cent, and the Missouri Pacific 12.11 per cent. The reason for this is that operating expenses are divided in accordance with the proportion of current use, and include heavy charges for maintenance which, although attributable to unused as well as used capacity, are embraced in operating expenses, thus falling disproportionately on the larger users.

CAPITAL IMPROVEMENTS MUST BE PLANNED AND ORDERED FAR IN ADVANCE.

Fixed improvements like the monumental union passenger station and other terminal facilities at Kansas City cannot be ordered like current supplies—coal and oil and such articles, and purchased from time to time

in quantities in keeping with the requirements of the moment. They must be ordered long in advance. The needs of the future must be forecast as accurately as may be. The possibilities of error, of misreading the future and miscalculating its requirements, are great indeed. Prophecy is difficult, and the business man who must resort to it always risks serious loss.

OWNERS OF CAPITAL IMPROVEMENTS MUST PAY FOR CAPACITY RATHER THAN USE.

Important business structures, unlike expendable goods or short-lived equipment, must be planned for long in advance, take years to build, and are ordinarily designed to accommodate the needs of the business over extended periods of time, thirty, forty, fifty, a hundred or two hundred years. When built by a single company for its own exclusive occupancy, it may prove always exactly suitable for the size of the business carried on. Oftener than not, however, it turns out to be too large or too small. If too large, the actual use is less than the full capacity, and the capital charges are disproportionately large in comparison with the actual needs of the business, this being a burden imposed on the owner by reason of the inaccuracy of his forecast when building plans were being made. The result is unfortunate but, so far as there is any blame at all, its rests on the one who was unable to see clearly into the future.

The situation is no different than in the first example if two firms engaged in the same line of business enter into a cooperative arrangement for the construction of

a building or other capital facilities. The size and cost of the structure are determined by the combined estimate of the future needs. If this be correct in all particulars, there should be no difficulties about the burden of capital charges. If both overestimated their requirements in equal degree and the capacity provided turns out to be larger than necessary, both must bear a capital burden which, when measured by their actual needs and actual use of capacity, is excessive, but neither is entitled to relief and neither can secure any save through bankruptcy. If, on the other hand, one of the participants accurately estimates his needs and utilizes to the full his share of the capacity of the improvements, while the other optimistically overestimates his requirements and actually uses only a fraction of his share of this capacity, is there any reason why there should be a readjustment of the capital charges? In such circumstances, would it be equitable or just or lawful to readjust the capital burden on the basis of user and require the first party to pay for a capacity which he did not order and does not need so as to relieve the second party of the necessity for paying for a capacity which he did order, and for whose provision he is entirely responsible, although he finds himself unable to use. Here clearly the second party under every principle of law and justice is required to abide the results of his own mistake in providing for a capacity in the jointly used property in excess of his needs. If he has become a joint owner of a building and is entitled to use 50 per cent of the capacity but only uses 10 per cent, whereas the other joint owner uses his entire 50 per cent, he is entitled neither to be relieved

of all of the capital burden in excess of the proportion of his use to the total capacity, that is, of everything in excess of 10 per cent, nor to be relieved of his proportion of the capital burden in excess of his proportion of the total use, that is, of everything in excess of 16-2/3 per cent, which is his proportion of the total use when the plant is used only to 60 per cent of its capacity.

PARTICIPANTS IN KANSAS CITY TERMINAL UNDERTOOK OBLIGATIONS OF OWNERS.

The situation with respect to the Kansas City Terminal, although more complex than in the illustration just given, is essentially the same in principle. This property was eight years in building, including the time spent in negotiating for real estate and franchises, and those promoting it hoped for a useful life of from fifty to two hundred years, the latter of which was made the term of the Operating Agreement. The twelve participating lines were making an outlay for capital improvements to last for that period of time and were of necessity ordering their terminal requirements that far in advance. This was a long commitment—but certainly no longer than called for by the exigencies of the situation. They were compelled to provide for their requirements in that way. Nobody was willing to construct the terminal plant and grant short-term leases or operating agreements to the various carriers entering into the city. Nobody was able and willing to run the risk at the end of limited periods, of say ten or twenty

years, of losing tenants or being forced to accept reduced compensation. An independent terminal company, one independently financed, owned and operated for profit was an impossibility. The participating lines of necessity were forced to assume the responsibility. They built the terminal, employing the convenient instrumentality of the Terminal Company, which, although independent in theory, was and is in fact dependent for its very existence and its ability to proceed upon the financial guaranties and the covenants of use by the participating lines. Each of the companies by its original commitments ordered a fairly definite part of the total capacity of the Terminal Company in furnishing facilities of the required kind. Each of the roads was under the necessity at that time of making an accurate forecast of its terminal requirements in Kansas City over a period of from fifty to two hundred years, the estimated service life of the elaborate and expensive plant provided. In every essential and substantial respect this was a capital commitment which only the bankruptcy of a contracting party could relieve against. If any one of them overestimated its probable future need, that was its own fault, so far as there is any fault attributable to finite human minds in being unable to pierce so far into the future.

LARGER USERS NOT UTILIZING UNDUE PROPORTION OF CAPACITY.

One of the fundamental errors of the petitioners is that they overlook entirely the most important question of the capacity of the Terminal and have regard only to the

extent of actual use. They do not so much as consider whether the actual use made by the so-called larger users, the Santa Fe, the Rock Island and the Missouri Pacific, is in excess of the capacity ordered by them at the inception of the enterprise. They ignore the fact that in the case of the Santa Fe, for instance, its alleged present enjoyment of 26.05 of the total use, which is not conceded, might even if true involve no more than the proportion of the total capacity which the Santa Fe originally ordered and to which it committed itself. As long as the Santa Fe or the other large users do not each use more of the total capacity than the proportion for which it originally committed itself, there cannot be the slightest inequity in limiting its capital burden to that proportion of the whole.

PETITIONERS ARE ALONE RESPONSIBLE IF THEY OVERESTIMATED EXTENT OF THEIR NEED OF TERMINAL FACILITIES.

At least half of the cost of the Terminal represents an outlay on account of passenger business in providing the monumental union passenger station with its appurtenances and the expensive avenues of approach for the various rail lines. When the project was set on foot, the passenger business was and had been for years increasing in volume at a rapid rate and to all appearances there were many good reasons why even the smaller lines should be optimistic with respect to their future requirements. The subsequent history of the passenger business is a matter of common knowledge. It has long ceased to in-

crease. For years it has been subject to a progressive decline. This loss of business has been greater for short runs, such as those of some of the smaller users as compared with the longer runs, such as those of some of the larger users. It may be that the petitioners and some of the other smaller users failed when they entered into the project in 1908 or 1910 to make an accurate forecast of these developments, or that they committed themselves to capital improvements in excess of their present needs. But the burden of these mistakes cannot be justly forced upon the shoulders of the larger users. Regardless of any question of legal rights, it is monstrously unfair and inequitable even to suggest such a transfer of burdens without showing that the larger users are in fact employing a proportion of the total potential capacity in excess of their proportion of the original contributions and undertakings for continuing payments. When the extent of the present use is considered, it must be gauged in the light not of total present use but of total potential capacity because that is the thing that the participating carriers expended their money to create.

The Kansas City Terminal, however, cannot be regarded as solely a passenger terminal. With its 172 miles of all tracks serving some 208 industries, many of them of the greatest importance from the standpoint of revenue and tonnage, it is a tremendously valuable freight terminal. In 1923 its traffic, measured by car miles, was 73.4 per cent freight, its passenger business being only 26.6 per cent. To reproduce the freight facilities today would entail an outlay greatly in ex-

cess of the original cost. From every standpoint those facilities are worth more than they cost, and their enhancement in value has made up for any decline in the value of the passenger facilities, if indeed any decline has taken place.

Petitioners have at no time shown, or even attempted to show, that when all of their terminal costs are considered, both passenger and freight, they are paying more than the value of the service.

COMMISSION HAS DEFINITELY UPHELD FAIRNESS OF CAPACITY BASIS.

We wish to emphasize these equitable considerations in this Court because our predominating attention to the legal issues of the case in the proceedings before the lower courts seems to have led those tribunals into a mistaken assumption that the equities were really with the petitioners.

The Commission in its first decision (104 I. C. C. 203, 225) fell to a more limited extent into the same error, in suggesting the advisability of a reexamination by the respective participating carriers of the whole arrangement. But at the same time it recognized that anything of this sort would require an adjustment of property interests; and later, in the second *Missouri-Kansas-Texas Case,* 198 I. C. C. 4, 12, when it had occasion to make the reexamination itself and to come closer to grips with the real problem, it held that payments for interest and taxes should be on the unit or numerical rather than the user basis, even in the case

of a small user unencumbered and unembarrassed by binding contractual obligations. Its holding there that the proper basis of measurement of payments of joint users for capital improvements is assigned capacity rather than fluctuating use is a definite adjudication of the lack of merit of the petitioners' claim.

CONCLUSION.

For the reasons herein set forth as well as those advanced in the brief of the Kansas City Terminal, these respondents respectfully pray the Court that the judgment of the Court of Appeals be affirmed, and that the writ of mandamus prayed for be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 234

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Respondents.

PETITION FOR REHEARING ON BEHALF OF PETITIONERS.

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PETITION FOR REHEARING ON BEHALF OF PETITIONERS.

Now come Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, petitioners herein, and respectfully pray the Court to grant a rehearing, and as reasons therefor submit the following:

From the opinion of the Court and the record in the case, the following facts are obvious:

(1) This Court felt that the operating agreement at Kansas City was inequitable. Upon that point this Court said:

> "The Commission's report indicates that the operating agreement is inequitable, since it calls for payments by the smaller lines in excess of benefits derived and permits the larger lines to enjoy the use of the facilities at an expense proportioned to use much less than that imposed upon the smaller users."

(2) On the same point the Court of Appeals went even further. It said (R. 207):

> "This suggestion of the Commission that the roads voluntarily amend the contract was obviously the result of the conclusion, inevitable in the circumstances, that the smaller railroads had made an unwise and oppressive agreement which, in the light of subsequent events, seriously impaired their ability to operate their properties on a satisfactory basis, and there can be no reasonable doubt either of the fact or the result. * * * No further illustrations are needed to show that the contract according to its terms imposes on the smaller lines payments altogether in excess of benefits received, and we have no reason to doubt that if the contract were now in the making the user basis as applied both to fixed charges and operating expenses would be considered the only fair and reasonable method to adopt."

(3) The petitions of petitioners to the Commission were denied because a majority of the Commission was of the opinion that the Commission was without power to give the requested relief. On this point this Court said:

> "We are, however, of opinion that, fairly considered, the report does not bear the construction contended for, but shows the Commission, upon analysis of the complaint and the evidence, found that the Act did not confer authority to accord the relief demanded."

(4) The order entered by the Commission denying the relief was negative in form and substance. Accordingly, petitioners were unable to proceed by injunction. Mandamus was their only remedy. On this point this Court said:

> "But the order here made was negative in form and substance—the refusal of relief—and the remedy by suit in equity was therefore not available to the petitioners."

(5) From the foregoing it is obvious that petitioners may be entitled to relief, but have no remedy unless the writ issues *or this Court at least decides the question of*

law involved. This Court held in its opinion that this fact did not justify the issuance of the writ, but *petitioners respectfully submit that even so, the Court should at least decide the question of law involved.*

In its opinion in the instant case this Court did not decide the all-important question presented. Without deciding that question, this Court affirmed the decision of the lower court, not because the reasoning of the lower court was sound, not because the decision of the Commission was sound, but for the reason, as stated in the opinion, that where,—

> "the matter is not beyond peradventure clear, we have invariably refused the writ, even though the question were one of law as to the extent of the statutory power of an administrative officer or body."

Nine prior decisions of this Court are cited by this Court in support of its conclusion. Petitioners respectfully submit that none of them justify the application of the rule as stated. We have not been able to find any case where this Court has denied a request for mandamus because the Commission's power was debatable. On the contrary, in every case where a writ was issued, the question of the Commission's power was doubtful until finally determined by this Court.

In the *Humboldt Steamship Case,* 224 U. S. 474, the question of law could not have been clear beyond peradventure. The Supreme Court of the District of Columbia had dismissed the petition, and its judgment had been reversed by the Court of Appeals. *The correct interpretation of the law on the subject was not known until this Court affirmed the judgment of the Court of Appeals.*

In the *Louisville Cement Company Case,* 246 U. S. 638, the question of law could not have been clear beyond peradventure. The Supreme Court of the District had denied the writ, and its judgment had been affirmed by the Court

of Appeals. Nevertheless, this Court differed from the two lower courts and directed that the writ issue.

In the *Kansas City Southern Case,* 252 U. S. 178, the question of law could not have been clear beyond peradventure. The Supreme Court of the District had denied the writ, and its judgment had been affirmed in the Court of Appeals by a divided court. It was not until this Court reversed the decision of the two lower courts and directed the issuance of the writ that any one knew certainly what the law was.

Nor have we been able to find a case in which the Commission denied a power or duty and in which mandamus was denied by this Court without a consideration of the statute involved and a determination that the claimed power or duty did not exist.

Thus, in the *New York, New Haven & Hartford Railroad Case,* 287 U. S. 178, there was a determination that the statute did not impose upon the Commission the asserted duty. In that case also, the existence of the duty was doubtful, for the Supreme Court of the District had dismissed the petition, the Court of Appeals had reversed the judgment of the Supreme Court of the District, and this Court in turn reversed the decision of the Court of Appeals. This Court did not deny the writ because the case was doubtful. It denied the writ because it decided that the asserted duty had not been imposed by statute.

In the *Los Angeles Case,* 280 U. S. 52, the claimed power of the Commission was doubtful, for the Supreme Court of the District had dismissed the petition, the Court of Appeals had reversed the judgment of the District Court, and this Court reversed the judgment of the Court of Appeals. Instead of refusing the writ for the reason assigned in the case at bar, this Court discussed the debated question of law at great length and finally reversed the Court of Appeals and affirmed the District Court because, as this Court

held, the asserted power had not in fact been vested in the Commission.

Conclusion.

Petitioners respectfully submit to this Court that they brought this case in order to have the legal question decided. They had and have no other way to get it decided. Yet, under the decision herein, the very existence of the question which made recourse to this Court necessary is assigned by this Court as its *sole reason for the denial of the writ.*

Petitioners respectfully submit that such a conclusion is not sustained by previous decisions of the Court and constitutes a departure from the rule applied in previous cases in which mandamus against the Commission has either been granted or denied. In each of such cases, petitioners respectfully submit that the question of law was decided.

Irrespective of technical legal argument, the record in this case presents a question of primary importance. Petitioners are now subjected to an inequity which is damaging not only to them but to the public interest, but are precluded from securing relief, even though the law may prohibit the inequity.

Petitioners, therefore, respectfully pray that this petition for rehearing may be granted, to the end that it may be determined whether or not the Interstate Commerce Commission has the power which petitioners claim for it.

Respectfully submitted,

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S. W. Moore,
F. H. Moore,
A. F. Smith,
Frank H. Towner,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

I, Frank H. Towner, one of the counsel for Petitioners herein, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Frank H. Towner

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SUPREME COURT OF THE UNITED STATES.

No. 234.—October Term, 1934.

The United States of America *ex rel.* Chicago Great Western Railroad Co., et al., Petitioners,
vs.
Interstate Commerce Commission, et al.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[January 7, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

This cause calls for the application of familiar principles governing the issuance of the writ of mandamus. The petitioners urge that the courts below erred in denying the writ. For an understanding of the contention the circumstances out of which the litigation arose should be stated.

Prior to the year 1906 ten railroads entering Kansas City used a union depot. Two others, the Chicago Great Western and the Kansas City Southern (the petitioners), used the station belonging to the latter. The union station was inadequate and there was agitation for better facilities. As a consequence the ten roads set about to acquire the necessary property and rights and to construct a new union terminal. The instrumentality created for the purpose was the respondent, the Kansas City Terminal Railway Company, a corporation organized by the railroads, for whose stock they subscribed in equal shares. This company acquired from the constituent roads and from others the property and franchises requisite to the construction of the terminal. In addition to the moneys subscribed for stock, the terminal company borrowed in excess of $50,000,000.

The financing and operation of the project was governed by an operating agreement between the railroads, the terminal company and a trustee, which provided, amongst other things, for the construction, maintenance and operation of the terminal and its use by the proprietary companies throughout a term of two hun-

dred years; equal ownership of the terminal company's stock; the admittance of other railroads on equal terms as to ownership of stock and use of the property by consent of two-thirds of the participants not in default under the agreement; issuance and sale of the terminal company's bonds secured by mortgage on its property; payment by each proprietary road of an equal share of taxes and governmental charges of the company and of interest and principal of its mortgage indebtedness; payment of a defaulting railroad's share of these charges by the remaining proprietaries in equal shares; exclusion of any defaulting road from the use of the facilities; the sharing of expenses of maintenance and operation by the using companies in proportion to each one's use. The stock of the terminal company was deposited with a trustee, subject to a voting trust, to prevent its transfer to any one not a party to the operating agreement. The roads also assigned the operating agreement to the mortgage trustee as additional security. In 1910 the petitioners became parties to the agreement pursuant to its provisions.

The appointment of receivers in 1915 for the Missouri, Kansas and Texas Railway Company, one of the proprietary railroads, was followed by foreclosure under its mortgages. The decree of sale in foreclosure permitted the purchaser to adopt or reject any executory contract of the debtor. The purchasers organized the Missouri, Kansas & Texas Railroad Company (hereinafter designated M., K. & T.) to take title to the property and that company elected not to be bound by the operating agreement, with the result that it was without terminal facilities in Kansas City. Because of this lack it applied to the Interstate Commerce Commission pursuant to § 3 (4) of the Interstate Commerce Act[1] for an order granting it the right to use the terminal, conditioned on payment of compensation proportioned to use. A temporary order was issued, and the matter set for final hearing. Prior to the hearing all of the eleven remaining railroads, parties to the operating agreement, intervened. Those designated as the larger users of the terminal opposed the granting of the petition. Those termed the smaller users (including the petitioners in the present case) asked that if the prayer of the M., K. & T. should be granted they be afforded relief from the hardship and inequality of burden im-

[1] 49 U. S. C. § 3 (4).

posed upon them by the agreement by revision of the existing arrangement so that they might thereafter make use of the terminal upon terms as favorable as might be granted the M., K. & T. They based their request upon Sections 3 (1) (3) (4) and 15 (a) of the Act to regulate commerce, as amended. A motion was made to strike the intervening petitions of the small users on various grounds, amongst them that the Commission had no power to make an order superseding, modifying, nullifying or reforming the operating contract.

The matter came on for hearing, evidence was presented, and the petitioners showed that their use of the terminal over a period of years had averaged less than 3 per cent. of the total use, while their contribution to the interest and taxes amounted to 8 1/3 per cent. of the total. For example, in 1932 each of the twelve proprietary railroads paid approximately $200,000 on account of interest and taxes. If these charges had been divided on the basis of actual use some of the larger users would have paid approximately $600,000 and the petitioners only a little more than $50,000 each. The Commission's report indicates that the operating agreement is inequitable, since it calls for payments by the smaller lines in excess of benefits derived, and permits the larger lines to enjoy the use of the facilities at an expense, proportioned to use, much less than that imposed upon the smaller users.

The Commission filed its report and order November 10, 1925.[2] With respect to the relief sought by the M., K. & T. it developed there was pending in a federal court an action to determine the legality of that road's election to denounce the operating agreement. The Commission therefore withheld action, ordering that if the decision of the court should be that the new railroad had no right of abandonment the petition would, upon motion, be dismissed; but if the court should sustain the right of abrogation, the M., K. & T. might then move for an order granting it the use of the terminal upon an agreed compensation, and if no agreement could be reached, upon such terms as the Commission might fix. The intervening petitions of the smaller users were dismissed. So matters stood until the right of the M., K. & T. to reject the agreement had been judicially affirmed. Thereupon that company applied to the Commission for the ascertainment of the compen-

[2] 104 I. C. C. 203.

sation it should pay for use of the terminal, and the small users, including the present petitioners, presented petitions for rehearing upon the order of November, 1925, dismissing their interventions. These petitions were denied June 1, 1933, and the Commission proceeded to hear the case as one involving only the compensation to be paid by the M., K. & T. for use of the terminal. The petitioners then applied to the Supreme Court of the District of Columbia for a writ of mandamus directed to the Commission requiring it to vacate its orders of November, 1925, and June, 1933, with respect to the petitioners' interventions, and to hear and decide upon the merits the issues thereby raised. A rule to show cause issued, the Commission and certain intervenors answered, the petitioners demurred to the answers, the court overruled the demurrers, and as the petitioners elected to stand thereon, dismissed the petitions. Upon appeal, the Court of Appeals of the District affirmed the judgment.[3] We granted a writ of certiorari.[4]

The petitioners rely principally upon paragraphs (1) (3) and (4) of § 3 of the Act. The paragraphs are quoted in the margin.[5] Their position is that if the M., K. & T. is granted the use of the

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[3] 71 F. (2d) 336.

[4] 293 U. S. —.

[5] "(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

"(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal,

terminal pursuant to § 3 (4) on a basis more favorable than that available to its predecessor and to the petitioners under the operating agreement, unlawful discrimination forbidden by § 3 will result; and further, that they are entitled to petition for the grant of use upon compensation to be fixed by the Commission under paragraph (4) although they are parties to the agreement fixing their rights in the terminal. The respondents, by their motion to dismiss, challenged the power of the Commission to grant the relief asked. That body thus stated the problem presented:

"Whether, then, Congress has or has not appropriately exerted its plenary power directly or through us is a question at the threshold of each case, and it remains here to consider whether the particular power invoked by the interveners has been conferred upon us."

After a discussion of paragraph (4) the Commission concluded:

"The power and authority thus invoked are not conferred by the quoted paragraph."

With respect to paragraph (3) it was held that, as the charges in question were essentially capital charges, they have no relation direct or indirect to the interchange of traffic between the several lines using the terminal, as contemplated by this paragraph, and the Commission was without authority thereunder to make the requested order.

Referring to paragraph (1), which prohibits undue prejudice or preference as between particular persons, firms, corporations,

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of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be." 49 U. S. C. § 3 (1), (3), (4).

or localities, or particular descriptions of traffic, the Commission said:

"Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property."

A contention that the case came within the declaration of policy of § 15 (a), with respect to the adjustment of rates so that the carriers as a whole or by groups will under honest, efficient and economical management earn a fair return upon their railway property used in transportation, was answered by the Commission thus:

"Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act."

The petitioners insist that under the plain terms of the Act the Commission had jurisdiction of their complaints, but refused to entertain them, and that mandamus is the appropriate remedy to compel a hearing and determination upon the merits. The respondents reply that the Act plainly confers no such jurisdiction, or at least that the matter is not so clear as to warrant interference by mandamus, and, in the alternative, that the Commission did take jurisdiction of the complaints and decide the merits. The Court of Appeals, without deciding whether the Act confers authority to grant the relief, held that the Commission in fact took jurisdiction, heard the cases, and decided as matter of law that it was without power or authority in the premises; that this constituted a decision which, whether right or wrong as matter of

law, was impregnable to the writ of mandamus. We concur in the result reached, but for reasons differing somewhat from those announced by that court.

1. The language used by the Commission with respect to the application of paragraph (1) of § 3 of the Act lends color to the respondents' argument that upon consideration of the whole record the Commission reached the conclusion that the enforcement of the operating agreement against the petitioners while exempting the new applicant, the M., K. & T., from its terms, did not amount to discrimination as defined by the Act. If this is a proper characterization of that body's action, no court can by mandamus compel it to alter its decision. Where judgment or discretion is reposed in an administrative agency and has by that agency been exercised, courts are powerless by the use of the writ to compel a different conclusion.[6] We are, however, of opinion that, fairly considered, the report does not bear the construction contended for, but shows the Commission, upon analysis of the complaint and the evidence, found that the Act did not confer authority to accord the relief demanded.

2. The petitioners insist that as they stated a case alleged to fall within the provisions of the Act, they were entitled to have the Commission consider the case as stated, and this right they were denied. They say the writ ought to issue to compel that body to hear and decide their case. The Court of Appeals, answering the contention, held that the Commission did in fact entertain the complaint, decided the cause, and even if it erred as matter of law in respect of its statutory power, cannot be coerced by mandamus to reverse its decision. The petitioners say that the fallacy in this reasoning is that whether the Commission refuses to receive a complaint, or upon receiving it entertains and grants a motion to dismiss for lack of jurisdiction, its action comes to the same thing, namely, a refusal of jurisdiction. We think that this is so. Whether an administrative tribunal refuses to hear, or upon a hearing determines that as a matter of law it lacks power to act, it is either correct in its conclusion or incorrect, and the question is whether, if it errs in refusing to act, it is compellable by mandamus to proceed.

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[6] *Interstate Commerce Comm.* v. *United States, ex rel. Waste Merchants Association*, 260 U. S. 32; *Interstate Commerce Comm.* v. *United States*, 289 U. S. 385, 394. Compare *Wilbur* v. *United States*, 281 U. S. 206, 218.

3. If beyond peradventure the Act does not confer upon the Commission the power invoked by a complainant, the writ will not be granted.[7] If on the other hand power and authority are plainly found in the Act, and the Commission erroneously refuses to exercise such power and authority, mandamus is the appropriate remedy to compel that body to proceed and to hear the case upon the merits. The fact that the complaint has been heard and, after hearing, the Commission has refused to enter an order because in its opinion no authority for such action is conferred by the statute, will not avail with the courts to prevent mandamus to correct a plain error of the Commission in renouncing jurisdiction.[8]

4. The ultimate question, then, upon the answer to which the decision of this case must turn, is whether, in holding that the statute granted it no authority to act in the premises, the Commission was so plainly and palpably wrong as matter of law that the writ should issue. It is to be noted that the solution of this question does not depend upon whether in a proper case this court would reach the same conclusion as that of the Commission. If that body had taken jurisdiction and granted relief a remedy would have been available to the respondents by the filing of a bill in equity to set aside the order and to enjoin its enforcement.[9] Had the matter been thus presented it would have been incumbent upon the courts, however doubtful the question, to decide it. But the order here made was negative in form and substance,—the refusal of relief,—and the remedy by suit in equity was therefore not available to the petitioners.[10] The absence of a remedy by suit or action to redress alleged error of an administrative body is not in itself sufficient to invoke the power of mandamus. Not only must there be no such remedy, but it must appear that the administrative tribunal was plainly and palpably wrong in refusing to take jurisdiction. Is this shown in the present instance? We think not. The Commission in a careful and painstaking review of the legislation defining its powers, professed itself unable to find a grant

[7] *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52.

[8] *Interstate Commerce Commission* v. *United States of America*, 224 U. S. 474, 484; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 642; *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission*, 252 U. S. 178, 187. Compare *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 393.

[9] U. S. C. Tit. 28, § 41 (28); §§ 43-47, inclusive.

[10] *Interstate Commerce Comm.* v. *United States*, 289 U. S. 385, 388.

of authority to set aside commitments in the nature of capital charges for property owned and used by the carriers. It adverted to the fact that paragraph (1) of § 3 of the Act was directed to discriminations, preference and prejudice in the performance of the duties of the carrier towards the public which dealt with them as carriers, and related particularly to rates, fares and charges, and that paragraph (3) was adopted to prevent discriminations and unfair practices as between carriers in interchange of freight and traffic. The language now found in these paragraphs has remained without amendment since the adoption of the original Act in 1887. It concluded that petitioners could not invoke the new paragraph (4) added to § 3 by the Transportation Act, 1920, because it was intended to give a right of use to one then having no such right in a terminal owned by another line, and was inapplicable to a case like the present, where the petitioners by their own voluntary agreement were entitled, and for many years had been entitled, to the use of a terminal of which they were in effect part owners. The Commission found itself unable to hold that the broad policy declared by § 15 (a) so altered the meaning of § 3 as to change the nature of the discriminations and practices denounced by that section. Its decision was not unanimous, certain of the members being of the opinion that power to grant the relief demanded could be spelled out of the Act reading it as a whole and as amended by the Transportation Act, 1920. This statement of the views of the Commission indicates that its conclusion was not so clearly erroneous as to call for the exercise of the extraordinary power involved in the issuance of mandamus. Where the matter is not beyond peradventure clear we have invariably refused the writ, even though the question were one of law as to the extent of the statutory power of an administrative officer or body.[11] We think this principle applicable in the present case, and that the courts below were right in refusing the writ.

The judgment is affirmed.

[11] *Keeside* v. *Walker*, 11 How. 272, 289; *International Contracting Co.* v. *Lamont*, 155 U. S. 303, 308; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 323; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108; *Ness* v. *Fisher*, 223 U. S. 683, 691; *Hall* v. *Payne*, 254 U. S. 343, 347; *Wilbur* v. *United States*, 281 U. S. 206, 219; *United States* v. *Wilbur*, 283 U. S. 414, 420; *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 191, 203.